LIBRARY
SUPREME COURT, U. S.

APPENDIX

Supreme Court, U.S.
FILED
APR 16 1971
E. ROBERT SEAVER, CLERK

70-9

In the Supreme Court

OF THE

United States

OCTOBER TERM 1970

No. ~~582~~

THOMAS C. LYNCH, et al., *Appellants*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

---

Jurisdictional Statement Filed August 22, 1970
Jurisdiction Postponed February 22, 1971.

PERHAU-WALSH PRINTING CO. SAN FRANCISCO, CALIFORNIA

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM 1970

No. 582

THOMAS C. LYNCH, et al., *Appellants*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

INDEX

	Page
Docket Entries	1
Amended Complaint for Money Damages, Declaratory and Injunctive Relief; Request for Temporary Restraining Order	11
Amended Order Denying Plaintiffs' Motion for the Convening of a Three-Judge District Court	26
Opinion of the United States Court of Appeals for the Ninth Circuit	28
Stipulation of Settled Statement of Issues	33
Order Granting Relief	92
Order	107

DOCKET ENTRIES

No. 45878
(Consolidated with Nos. 46297-46298, 46299, 45749, 46496, 47111, 50918)
(3 Judge Ct.—Duniway, Wollenberg & Zirpoli)
(Assigned to Judge Wollenberg)

Title of Case

ROBERT O. GILMORE and INMATES OF SAN QUENTIN STATE PRISON, etc.

Plaintiffs,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, et al.,

Defendants.

Basis of Action: Complaint for injunctive relief to prevent confiscation destruction of legal materials

Attorneys

For Plaintiff: A-67442 TAMAL
Mr. John Wahl, (*Apptd.*)
1255 Post St. Suite 1128,
S.F. 9; Tel. 771-5950

For Defendant:
Atty. Genrl. State Calif.
6000 State Bldg. S.F.
Marshall W. Krause,
Amer. Civil Liberties Union
503 Market St. S.F. 5
Amicus Curiae, behalf of pltf.

Plaintiff's Account

Date

10-27-66—Filing Fee—(Received 15.00)
OCT 31 1966—CD 1-33—(Disbursed 15.00)

Defendant's Account

6-25-70—Appeal—(Received 5.00)
JUN 26 1970—CD 1-103—(Disbursed 5.00)

Date	Filings-Proceedings
1966	
Oct. 27	1—Filed complaint issued summons (Folder to ACW)
Nov. 7	2—Filed copy of ltr., dated Nov. 4, 1966 from petnr. to U.S. Marshal.
Nov. 10	3—Filed order allowing petitioner to prosecute his complaint, without prepayment of fees. (Wollenberg) Copies to pltff. & Marshal.
Nov. 29	4—Filed Amendment to complaint.
Dec. 7	5—Filed "supplemental pleading/and amendments" by pltff.
Dec. 12	6—Filed summons, on return, exec.
Dec. 12	7—Filed order ext. time 30 days for defts. to answer or otherwise move with respect to pltff's. complt. (Wollenberg)
Dec 21	8—Filed affidavit of pltff. to enter judgment by default. (to ACW)

Date	Filings-Proceedings
1967	
Jan. 1—9	Filed order consolidating actions Nos. 45878, 46297, 46298 & 46299 for all future proceedings, allowing all pltffs. to proceed in forma pauperis; denying mo. for temp. restrain order and appointing Mr. John Wahl as atty to represent plaintiffs. (Sweigert)
Jan. 11—10	Filed notice by defts. of motion to dismiss, Feb. 6, 1967, 10 AM, with supporting papers attached.
Jan. 13—11	Filed order directing Clerk to make copies of all papers filed or hereinafter filed by petnrs. as requested by Mr. Wahl, without charge to petnrs. or their Court appointed counsel. (Sweigert)
Jan. 24—12	Filed stip. & order cont. mo. to dismiss to Feb. 27, 1967 at 10 A.M. (Carter)
Feb. 7—13	Filed notice by pltff's atty of change of address to 1255 Post St. Suite 1128, S.F.
Feb. 10—14	Filed stip. & order cont. mo. to dismiss to Mar. 20, 1967, 10 A.M. (Carter)
Mar. 10—15	Filed request by pltffs. for temp. restraining order.
Mar. 10—16	Filed affidavit of John Eshleman Wahl supporting request for temp. restrain. order.
Mar. 10—17	Filed request by pltffs. for temp. restrain. order.
Mar. 10—18	Filed affidavit of John Eshleman Wahl supporting request for temp. restrain. order.

Date	Filings-Proceedings

1967

Mar. 10—19—Filed Temporary Restraining order, issued 4:23 P.M. Copies mailed attys. (Harris)

Mar. 10—Ord., aft. hrg. pltffs' appli. temp. restrain. order as to legal material granted & pltffs' appli. for temp. restrain. order as to communications denied; fur. ord. pltffs' mo. for prelim. injunc. be set for hrg. Mar. 27, 1967. (Harris)

Mar. 14—20—Filed motion by pltffs. for preliminary injunction and for convening of 3 Judge Court, with supporting memo, affdavits and exhibits attached.

Mar. 15—21—Filed notice by pltffs. of hrg. mo. for prelim. injunc., March 27, 1967, 10 A.M.

Mar 15—22—Filed affidavit of service of mo. for prelim. injunc.

Mar. 16—23—Filed stip. & order regarding mo. to dismiss & mo. for prelim. injunc. (3/27/67) (Wollenberg)

Mar. 20—24—Filed memo by pltff. opposing mo. to dismiss.

Mar. 23—25—Filed affidavit of service of pltffs' opposition to mo. to dismiss.

Mar. 24—26—Filed motion by American Civil Liberties Union of Northern California to participate as Amicus Curiae on behalf of plaintiffs, with supporting papers attached. (to ACW)

Mar. 27—Ord. aft. hrg., pltff. to amend complt and matter cont'd to Aprl. 10, 1967 for fur. hearing. (Wollenberg)

Date	Filings-Proceedings
1967	

Apr. 3—27—Filed Amended Complaint, and request for temp. restraining order. (hrg. 4/4/67 WTS)

Apr. 4—Ord., aft. hrg., pltffs' mo. for temp. restrain. order denied; defts to produce any documents which are to be used in this Court. (Sweigert)

Apr. 10—Ordered motion for preliminary injunction & for 3 Judge Court & motion to dismiss cont to April 17, 1967. (Harris)

Apr. 12—28—Filed order allowing John E. Wahl to take custody of papers lodged with the clerk to be returned before 9:30 a.m. April 17, 1967. (Sweigert)

Apr. 14—29—Filed memo by defts. opposing mo. for convening of 3 Judge District Court.

Apr. 17—Ord., aft. hrg. counsel, fur. hrg. on pltff's. mos. for prelim. injunc., for 3 judge Court & to dismiss, cont'd. to Apr. 21, 1967, 10 A.M. (Wollenberg)

Apr. 20—30—Filed memo by defts. opposing request for temp. restraining order.

Apr. 21—Ord., aft. arguments, the petn. for T.R.O. be granted in part; defts have 20 days from Apr. 24, 1967 to respond to amended complt. & consolidated cases are assigned to Judge Wollenberg for further proceedings; pltff's. counsel to prepare order; fur. ord. cont'd. to May 26, 1967 for fur. hrg. on mo. for 3 Judge Court. (Wollenberg)

Date	Filings-Proceedings
1967	

Apr. 25—31—Filed temp. restrain. order; defts. have 20 addtl days to file response to amdned. complt; mo. to convene 3 judg. Ct. sched. on May 26, 1967, 10 A.M.; pltff's. mo. prelim. injunc. & deft's. mo. to dismiss cont'd. to a time after defts file a responsive pleading to pltffs' amended complt. (Wollenberg)

May 8—32—Filed order renewing & ext. temp. restraining order until 6 o'clock p.m. on May 18, 1967. (Wollenberg)

May 16—33—Filed stip. & order ext. time for defts. to file motions in response to pltffs' amended complt., to May 17, 1967. (Burke)

May 17—34—Filed notice by defts. of motion to strike, to dismiss and for summary judgment, Jun. 12, 1967, 10 A.M., with supporting papers attached.

May 18—35—Filed affidavit of William A. Young.

May 18—36—Filed affidavit of Joseph William Wade.

May 19—Filed order consolidating actions Nos. 45749, 46496 & 47111 with action No. 45878. (In 45749) (Wollenberg)

May 25—37—Filed affidavit & declaration of Martin J. Winthal. (to ACW)

May 26—Ord. that petnr's. time to answer the resp's mo. to dismiss, to strike & sum. judg. noticed for June 12 is granted and that submission of petnr's. mo. for a 3 Judge Court cont'd. to June 12, 1967. (Wollenberg)

Date	Filings-Proceedings
1967	
Jun. 7	38—Filed memo by pltffs opposing defts' mos. to dismiss, for sum. judg. & to strike.
Jun. 12	39—Filed declaration and affidavit of George R. Guay. (to ACW)
Jun. 12	—Ord. mo. for a 3 Judge Court submitted and denied as per order this day signed & filed; pltff's. mo. to proceed on appeal of the denial of the mo. for a 3 judge court in forma pauperis, granted; Fur. Ord. the remainder of the pltff's. & deft's mos. are to go off cal. to be renoticed upon the results of appeal herein. (Wollenberg)
Jun. 12	40—Filed order denying pltffs' mo. for 3 Judge Court. Copies mailed to counsel for petnr. & A.G. (Wollenberg)
Jun. 22	41—Filed pltffs amended motion for preliminary injunction, with supporting memo & various affidavits & papers attached.
Jun. 22	42—Filed order granting mo. of pltff. for leave to appeal in forma pauperis, without prepayment of fees & costs or the costs of a stenographic transcript or printing the record. (Wollenberg)
Jun. 22	43—Filed notice of appeal by plaintiffs.
July 6	44—Filed amended order denying pltff's motion for the convening of a three-Judge Court. (Wollenberg)
July 11	45—Filed stip. re designation of record on appeal.
July 17	46—Filed notice of appeal by pltffs.
July 21	47—Filed designation by pltff. of record on appeal.

Date	Filings-Proceedings

1967

July 25—48—Filed notice by pltffs. of withdrawal of mo. for change of venue in case No. 45878.

Aug. 1—Made, Hand Carried Record on Appeal.

Aug. 1—49—Filed receipt from CCA for record on appeal in this case and cases Nos. 46297, 46298, 46299, 47015, 45749, 47111 & 46495.

Aug. 11—50—Filed request by pltffs. for temporary restraining order.

Aug. 11—51—Filed request by pltffs' atty to sever action No. 46495, Ruchell Magee from consol. actions and request that John Eshleman Wahl be withdrawn as counsel for said plaintiff.

Aug. 14—52—Filed affidavit of Grant M. Salzman.

Aug. 14—53—Filed affidavit of Kenneth Miranda.

Aug. 14—54—4:15 P.M., Filed Temporary Restraining Order to expire on Aug. 24, 1967, 2:00 P.M. unless extended; pltffs to file amended notice of motion for prelim. injunc. by Aug. 24, 1967. (Wollenberg)

Aug. 24—55—Filed amendment by pltff. to mo. for prelim. injunc.

Sept. 7—56—Filed stip. & ord. cont. temp. restraining order issued Aug. 14, 67 be cont. for sixty days. (Wollenberg)

Oct. 10—57—Filed ord. denying request for severance and request of atty. to withdraw as counsel for the pltf. in case 46495. (Wollenberg)

Oct. 13—58—Filed affidavit of service to withdraw as counsel in case 46495.

Oct. 21—59—Filed affid of Robert O. Gilmore Jr.

Date	Filings-Proceedings

1969

Mar. 19—60—Filed certified copy of opinion & judgment reversing the U.S. Dist. Court & remanding for further proceeding looking toward the convening of a 3 Judge Court (Chambers Merrill & Ely) To Judge ACW.

Mar. 19—61—Filed order denying certiorari (Supreme Court of United States)

Apr. 14—62—Filed order convening 3 Judge Court, consisting of Judges Ben C. Duniway, Albert C. Wollenberg & Alfonso J. Zirpoli; the same judges are appointed to serve in Dist. Court cases Nos. 46297, 46298, 46299, 47015, 47111, 45749, 48232, 48351, 48352, 48353, 48354, 48355, 48361, 48362, 48607, 48858, 48974, 49073, 49090, 49856, 49942, 49943, 50024, 50775 and 50855. (Chambers, CJ)

Jun. 30—63—Filed copy of ltr. from petitioner Calvin W. Jackson to Clerk USDC dated June 27, 69 "Adinquirdum".

Sept. 26—Filed ORD consolidating 50918 with 45878, 46297, 46298, 46299 (IN 50918)

1970

Feb. 9—64—Filed Stip of settled statement of issues.

Feb. 18—65—Filed Stip to request for hrg for Feb. 23, 1970.

Mar. 2—66—Filed Clerk's notice that on April 30, 1970, 1:30 P.M. for hrg. Should the hrg not be completed it will be contd to May 1, 1970 at 1:30 P.M. Clerk.

Apr. 27—67—Filed Amicus Curiae Memorandum of points and authorities in support of Pltffs, copy to Duniway, Wollenberg & Zirpoli.

Date	Filings-Proceedings

1970

Apr. 27—68—Filed Deft's memorandum of law upon issues submitted to the 3 Judge Court by Stipulation filed Feb. 9-70, copy to Duniway, Wollenberg & Zirpoli.

Apr. 27—69—Filed Pltff's Brief in support of motion filed by Pltff's in opposition to motions filed by Deft's, copy to Duniway, Wollenberg, & Zirpoli.

Apr. 30—Three Judge hearing before the Hon. Ben Duniway, Hon. Alfonso J. Zirpoli and Hon. Albert C. Wollenberg. John Wahl appearing for the Pltff's and Robert R. Granucci appearing for the Deft's State of Calif. 10 days to submit requested information in reference to the law books & matter to then stand submitted.

May 28—70—Filed Order granting Relief (Duniway, Wollenberg & Zirpoli)

Jun. 25—71—Filed notice of Appeal by Deft's to the Supreme Court of the United States.

Jun. 26—Mailed Clerk's notice of filing appeal.

Jul. 28—72—Filed appli. by defts. for stay that portion of order of May 26, 1970 which orders defts to formulate new or amended regulations. (to ACW)

Jul. 29—73—Filed motion to Intervene by Neil Edward Darrow a Pltff (unnotice)

Aug. 5—Made Mailed Record on Appeal to Supreme Court of U. S. by Certified Mail No. 224356.

Aug. 13—74—Filed Return Receipt from Supreme Court of U.S. of Certificate of Clerk to Record on Appeal.

United States District Court for the
Northern District of California

Civil Nos. 45878, 46297, 46298, 46299

John Van Geldern, Thomas Francis Boyle, Jr., Irving G. Robertson, Robert G. Beattie, and Robert O. Gilmore, Jr., et al., for themselves and on behalf of all indigent inmates of California penal institutions, a class of persons too numerous to make practical the appearance of all members of the class in this action,

Plaintiffs,

vs.

Thomas C. Lynch, Attorney General, Doris H. Maier, Deputy Attorney General, Doe One through Doe Ten, Deputies or Assistants or Employees or Agents of the Attorney General of California, Fred Dickson, Chairman, Adult Authority, Doe Eleven through Doe Twenty, Members, Adult Authority, or Employees or Agents of the California Adult Authority, Walter Dunbar, Director of Corrections, Richard A. McGee, Administrator, A. L. Oliver, Warden, Lawrence Wilson, Warden, Doe Twenty-One through Doe Thirty, Wardens or Superintendents of California penal institutions, Doe Thirty-One through Doe Fifty, Members, Employees, Agents or Privies of the California Department of Corrections, Leona Ragle, Mail-handler, Does Fifty-One through Sixty, Mail-handlers or Mail-handling officials, A. George Oakley, Prison Official, Doe Sixty-One through Doe Eighty, and People of the State of California,

Defendants.

AMENDED COMPLAINT FOR MONEY DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF; REQUEST FOR TEMPORARY RESTRAINING ORDER

Jurisdiction

The action arises under the Constitution of the United States, Article Four, Section Two; the Constitution of the United States, Article Six; the Fourteenth Amendment to the Constitution of the United States, Section One; the Act of 1948, 62 Stat. 964 as amended, U.S.C., Title 28, §§2201, 2202; the Act of 1948, 62 Stat. 968 as amended, U.S.C., Title 28, §§2281, 2284; R.S. §1977, U.S.C., Title 42, §1981; R.S. §1979, U.S.C., Title 42, §1983; R.S. §1980, U.S.C., Title 42, §1985; R.S. §1981, U.S.C., Title 42, §1986; R.S. §722, U.S.C., Title 42, §1988; as hereinafter more fully appears. The jurisdiction of this court is founded on those sections and on 28 U.S.C. §§1331, 1343. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

Statement of Claim

Plaintiffs bring this action for themselves and on behalf of all similarly situated prisoners, indigent inmates of the penal institutions of the State of California, a class which has so many members that it is impractical to bring them all before this court. The plaintiffs adequately represent this class. Plaintiffs request leave of court to substitute in and add plaintiffs as necessary in this action in order to maintain adequate class representation.

During all times herein mentioned plaintiffs were and are prisoners of the State of California, confined as inmates of penal institutions owned, operated, managed, and controlled by that State. During all the

times herein mentioned plaintiffs were and are citizens of the United States of America and of the State of California. During all the times herein mentioned plaintiffs were and are indigent.

The individual defendants have committed separate acts, or have engaged in continuing concerted action, all designed to hinder, delay, and make ineffectual plaintiffs' exercise of the rights of due process of law and equal protection of the law, as those rights concern access to the courts, and which rights are guaranteed by the Fourteenth Amendment to the Constitution of the United States, Section One, and, with regard to access to the courts, by R.S. §1977, U.S.C., Title 42, §1981.

Insofar as the individual defendants have engaged in the complained of concerted action, said concerted action was in part carried out under color of a claim of acting pursuant to State statute, ordinance, regulation, custom, or usage; or these individual defendants have had knowledge that the separate acts committed complained of, or the concerted action complained of, were about to be committed, and these individual defendants, having power to prevent or aid in preventing the commission of same, neglected or refused to do so.

The concerted action complained of amounts to a conspiracy to intentionally and purposefully discriminatorily deprive plaintiffs, as individuals and as members of the class they represent in this action, of rights to due process of law and equal protection of the laws as those rights have to do with access to the courts.

The separate acts committed complained of were committed under color of a claim of acting pursuant to State statute, ordinance, regulation, custom, or usage.

The individual defendants threaten to repeat indefinitely the separate acts or concerted action complained of, and the knowing neglect or refusal to prevent such separate acts or concerted action while having power to prevent the same, and thus the individual defendants threaten irreparable damage and injury to the plaintiffs and the class they represent.

The defendant People of the State of California are the ultimate owners, operators, managers, and controllers of the penal institutions of the State, and have power to prevent the wrongful conduct complained of herein, but will not do so unless commanded by the order of this court.

Specific acts or concerted action complained of, and knowing neglect in preventing or refusal to prevent specific acts or concerted action complained of, include the following:

The individual defendants have separately or in concert attempted to prohibit prisoner access, or severely limit prisoner access, to lawbooks, legal opinions, and other materials necessary for the effective preparation of legal petitions, arguments, and pleadings. The attempts have, in some cases, been successful. The purpose of these attempts has been to hinder, delay, and make ineffectual prisoner, and plaintiffs', access to the courts. Defendants have carried out said attempts by promulgating and attempting to enforce

regulations which severely limit the numbers of, and titles of, lawbooks and related books which can be stocked in libraries of penal institutions, and which can be possessed by inmates, and said regulations have even directed that books in excess of the amounts and titles or categories authorized, shall be destroyed. Defendants' regulations complained of are, in part, set forth in previous complaints filed in this action, and are incorporated herein by reference. Defendants have also carried out said attempts by deliberately delaying delivery of mail, put into defendant's custody by prisoners, including the plaintiffs Boyle and Gilmore, but not limited to those plaintiffs, addressed to courts or attorneys, and in some instances defendants have confiscated or refused to mail communications put into their hands by prisoners, including the plaintiffs Boyle and Gilmore, and including a co-plaintiff on No. 45878 (originally brought by plaintiff Gilmore and other inmates of San Quentin Prison), Commodore William Moss. Defendants have also deliberately delayed delivering mail to prisoners, which mail has been sent to the prisoners by courts and attorneys, causing, in some cases, appeals to be affirmed because prisoners have not been notified of the necessity for filing papers by a certain date, or because prisoners have not been given necessary transcripts, mailed to them, in time to prepare an appeal.

Defendants have further carried out attempts to hinder, delay, and make ineffectual prisoner and plaintiff access to the courts by informing prisoners, including plaintiffs Boyle and Gilmore, in hearings

before the California Adult Authority, that the Adult Authority took the activity of plaintiffs, in preparing in propria persona petitions and complaints, into account in a negative manner for the purpose of fixing length of sentence and and for the purpose of granting parole. Defendants follow a policy of using the powers of the Adult Authority to punish prisoners for filing complaints in Civil Rights or other actions, and for filing writs of habeas corpus.

Defendants have further carried out attempts to hinder, delay, and make ineffectual prisoner and plaintiff access to the courts by promulgating and attempting to enforce regulations which attempt to prohibit all legal assistance by one inmate to another, even if the inmate assisted is indigent and illiterate and does not have ability to prepare legal petitions, and even if the assistance is offered without any charge or condition. Defendants have confiscated papers, prepared and collected for use in this action, from plaintiff Van Geldern in pursuance of purported enforcement of said regulations, and defendants' attorneys refuse to deliver up such papers to plaintiffs' attorney.

Defendants follow a policy, and act and have acted accordingly, of punishing, under guise of punishing a violation of some other rule, inmates who prepare writs, petitions, or complaints to be submitted to the courts. Defendants have so acted towards and upon plaintiffs Boyle and Van Geldern.

Defendants limit the amount of time a prisoner or plaintiff can spend in the prison library to a number

of hours which is insufficient for the prisoners and plaintiffs, who are indigent and unlearned in the law, to properly prepare legal petitions and complaints.

Defendants do not allow prisoners to receive all of the lawbooks which the State library has, and only certain sets are available for circulation to inmates, and even of the sets theoretically available the practical availability is kept at such a low level that prisoners are unable to use them when they need them.

The individual defendants have committed separate acts, under color of acting pursuant to State statute, ordinance, regulation, custom, or usage, or have engaged in concerted action all designed to hinder, delay, and make ineffectual prisoner and plaintiffs' exercise of the right to complain to the authorities of the United States concerning violations of the laws of the United States, which right is guaranteed by the Constitution of the United States, especially Article Four, Section Two, and Article Six, and by the Fourteenth Amendment to the Constitution of the United States, Section One, or the individual defendants have had knowledge that such acts complained of, or concerted action complained of, were about to be committed, but these individual defendants, having power to prevent such acts or concerted action, neglected or refused to so prevent. Defendants have confiscated, or have refused to mail on, communications that prisoners and plaintiff Robertson have put into defendants' custody addressed to the Federal Bureau of Investigation, and to officials of the branches of government of the United States.

All of the acts, omissions, and concerted action complained of took place within a year immediately preceding the filing of No. 45878.

The acts, omissions, and concerted action complained of in the original complaints, and in amendments to the complaints, in Nos. 45878, 46297, 46298, and 46299, which are not complained of herein in the above matter are hereby complained of by incorporation by reference thereto. To the extent that matters complained of in this amended complaint are more particularly complained of in the original complaints, or in amendments to the original complaints, said greater particularity is hereby incorporated by reference thereto.

Plaintiffs do not know the names of defendants listed as Doe One through Doe Eighty. Plaintiffs will exercise due diligence in finding out the names of those defendants, and plaintiffs ask leave to amend to put in the real names of those defendants when said names are ascertained.

Demand

1. Plaintiffs demand a jury trial, should defendants contest the demands made herein for judgment, on contested issues of fact as provided for in Rule 38, Federal Rules of Civil Procedure. Plaintiffs request that a three-judge District Court be convened to hear and determine, on the basis of facts found by the jury, plaintiffs' demand for preliminary and permanent injunction.

2. Plaintiffs demand that defendants be permanently enjoined from enforcing the changes in prison regulations promulgated with Department of Corrections, State of California, Transmittal Letter 26/66 of September 19, 1966.

3. Plaintiffs demand that defendants be permanently enjoined from enforcing any regulations which would limit the access of prisoners to any lawbooks, any legal opinions, any legal publications, any documents prepared for use in court actions, or paper appropriate for use in filing petitions, such as pleading paper, unless the regulations enforced are for purposes which do not include the prevention of prisoner acquisition of legal knowledge and expertise for use in attacking convictions and sentences in the courts, or unless the regulations enforced are for purposes which do not include the prohibition of, or discouragement of, prisoners providing legal assistance to indigent prisoners when the assistance is provided free of charge or condition.

4. Plaintiffs demand that the injunctive relief requested in plaintiffs' motion for preliminary injunction be made a permanent injunction. Plaintiffs' motion for preliminary injunction was filed on March 14, 1967, with the Clerk of this court.

5. Plaintiffs demand that defendants be enjoined from acting towards plaintiffs, or the members of the class plaintiffs represent, in any way which is intentionally and purposefully and discriminatorily designed to discourage or deter plaintiffs from exercising their rights of access to the courts, and from

exercising their rights to complain to the authorities of the United States government concerning violations of the laws of the United States.

6. Plaintiff John Van Geldern demands judgment against defendants for ten thousand dollars ($10,000.-00), as general damages.

7. Plaintiff Thomas Francis Boyle, Jr. demands judgment against defendants for one hundred fifty thousand dollars ($150,000.00), as general damages.

8. Plaintiff Irving G. Robertson demands judgment against defendants for ten thousand dollars ($10,000.00), as general damages.

9. Plaintiff Albert G. Beattie demands judgment against defendants for one hundred twenty thousand dollars ($120,000.00), as general damages.

10. Plaintiff Robert O. Gilmore, Jr. demands judgment against defendants for fifty thousand dollars ($50,000.00), as general damages.

11. Each of the named plaintiffs demands judgment against defendants for ten thousand dollars ($10,000.00), as punitive damages, making a total demand of fifty thousand dollars ($50,000.00) in punitive damages.

12. Plaintiffs demand that defendants' conduct, as complained of herein, be declared contrary to the Constitution and laws of the United States, and that said conduct be further declared to be in violation of prisoner and plaintiffs' rights of access to the courts and rights to complain to the authorities of the United States concerning violation of the laws of the United States.

13. Plaintiffs demand that defendants be temporarily restrained from conduct which threatens immediate and substantial and irreparable injury and damage to plaintiffs, as set forth in the accompanying request for temporary restraining order and affidavit in support of said request, which are hereby incorporated by reference thereto.

/s/ John Eshleman Wahl,
Attorney for Plaintiffs,
1255 Post Street, Suite 1128,
San Francisco, California 94109

REQUEST FOR TEMPORARY RESTRAINING ORDER

Plaintiffs move the court, upon the complaints herein and the affidavit of John Eshleman Wahl, attached hereto, for a temporary restraining order against the defendants in this cause, their agents, servants, attorneys, and privies, pending the hearing and decision on plaintiffs' motion for a preliminary injunction, enjoining them from

I

Prohibiting inmates who are plaintiffs in this action from discussing this action with other inmates, or prohibiting plaintiffs in this action from possessing affidavits prepared by other inmates to be used in this action, or prohibiting plaintiffs in this action from possessing exhibits to affidavits to be used in this action when the affidavits or exhibits are intended for transmission to plaintiffs' attorney, or prohibiting plaintiffs from transmitting all such affidavits and exhibits to plaintiffs' attorney; and from

II

Punishing inmates for attempting to supply plaintiffs in this action with affidavits or exhibits to be sent to plaintiffs' attorney for use in this action; and from

III

Not delivering to plaintiffs' attorney, upon his demand at Folsom Prison during visiting hours, all the lawbooks and legal materials, affidavits, and exhibits of affidavits which were seized and confiscated from

the hospital locker of plaintiff John Van Geldern at Folsom Prison on or about March 26, 1967.

Plaintiffs further move for said temporary restraining order to be issued without formal notice and forthwith, on the ground that immediate substantial and irreparable injury and damage will result to plaintiffs before notice can be served and a hearing had thereon, as more fully appears from the attached affidavit of John Eshleman Wahl.

Dated:.....

.....

Attorney for Plaintiffs

AFFIDAVIT IN SUPPORT OF REQUEST FOR TEMPORARY RESTRAINING ORDER

State of California,
City and County of San Francisco—ss.

John Eshleman Wahl, being first duly sworn, deposes and says:

That he is attorney for plaintiffs in this cause, and that facts stated herein are true of his own knowledge except as to facts stated on information and belief, and that as to those matters he believes them to be true.

That on March 27, 1967, he received information that plaintiff Van Geldern's lawbooks had been confiscated. To investigate this report affiant, on March 28, 1967, went to Folsom Prison and there visited plaintiffs Van Geldern and Boyle. Plaintiff Van Geldern informed affiant that all of Van Geldern's legal materials which he had in his locker were confiscated, and that he was to be brought before a prison disciplinary board on charges of possessing contraband legal materials, which were affidavits and exhibits prepared and given to Van Geldern by other inmates for transmission to affiant for use in this action. Plaintiff Boyle informed affiant that he had been put in solitary confinement for giving plaintiff Van Geldern materials to be forwarded to affiant for use in this action, and plaintiff Boyle was to be brought before a prison disciplinary board on charges of assisting another inmate (Van Geldern) with legal work. Affiant does not know the outcome of the hearings, or if they have been had yet.

That affiant requested, by telephone, defendants' attorney, Mr. Robert R. Granucci, to obtain authorization for affiant to go to Folsom Prison and receive

the materials which Folsom authorities confiscated from plaintiff Van Geldern and which Van Geldern was getting ready to transmit to affiant. Defendants' attorney Granucci informed affiant that he would only allow affiant to have materials which plaintiff Van Geldern prepared himself, and that affiant would have to visit each inmate who prepared any material which plaintiff Van Geldern had and obtain that inmate's permission before affiant would be given the papers prepared by that inmate, even though those inmates had given the materials to plaintiff Van Geldern for transmission to affiant for use in this action. Furthermore affiant was given to understand that some exhibits to the affidavits would not be given to affiant in any event.

That plaintiffs, and the class they represent, suffer irreparable injury and damage as a result of defendants' acts already described and the threat of continued acts of this nature, because such conduct has damaged and continues to damage the effective preparation of plaintiffs' case by keeping information and documents, which are damaging to the defendants, from reaching counsel and court, and by keeping plaintiffs, and the class they represent, from freely communicating with each other and with counsel concerning this action, in which plaintiffs, and the class they represent, all have a common, real interest.

/s/ John Eshleman Wahl

Subscribed and sworn to before me this 3rd day of April, 1967.

(Seal) Phyllys M. Jackson,

Notary Public—California. Principal place of business in City and County of San Francisco. My commission expires January 28, 1971.

United States District Court for the
Northern District of California

Civil Nos. 45878, 46297, 46298, 46299, 47015,
45749, 46495, 47111

John Van Geldern, et al., Plaintiffs,

vs.

Thomas C. Lynch, et al., Defendants.

AMENDED ORDER DENYING PLAINTIFFS' MOTION FOR THE CONVENING OF A THREE-JUDGE DISTRICT COURT

It Is Ordered that Plaintiffs' Motion for the Convening of a Three-Judge Court pursuant to 28 U.S.C. § 2281 and § 2284 is hereby DENIED. This order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. The controlling question of law which is involved is whether Plaintiffs' claims, that Defendants' prison regulations should be enjoined as depriving Plaintiffs of Constitutional rights of access to the courts and equal protection of the laws, involve one or more substantial questions of Constitutional law under the

standards established in *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938) and *Ex parte Poresky*, 290 U.S. 30 (1933).

Dated: July 6, 1967.

Albert C. Wollenberg
United States District Judge

Original filed Jul. 6, 1967. Clerk, U.S. Dist. Court, San Francisco.

United States Court of Appeals
for the Ninth Circuit

Nos. 22,052 A-B-C-D-E-F

Robert O. Gilmore, Jr., et al.,
Appellants,

vs.

Thomas C. Lynch, et al.,
Appellees.

[August 16, 1968]

On Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, MERRILL and ELY, Circuit Judges

MERRILL, Circuit Judge:

This appeal is taken from an interlocutory order of the District Court for the Northern District of California denying petitioners' motion for the convening of a three-judge court pursuant to 28 U.S.C. §2281.[1]

---

[1] "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The appeal is taken pursuant to 28 U.S.C. §1292(b), the district judge having, in his order, certified that in his opinion the order involved "a controlling question of law as to which there is substantial ground for difference of opinion," and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." The controlling question as certified was whether appellants' claims involved a substantial question of constitutional law under the standards established in *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938), and *Ex Parte Poresky*, 290 U.S. 30 (1933).[2]

Appellants are 89 inmates of the California State Prison at San Quentin. The complaint names as defendants the People of the State of California, various prison officials and the head of the State Department of Correction. Appellants seek an injunction against the enforcement of certain rules adopted by the State Director of Corrections and contained in Department of Corrections Transmittal Letter No. 26/66, dated September 19, 1966, relating to the contents of prison law libraries and the future prison policy as to the obtaining and keeping by prisoners of private law

---

[2]In *Poresky* the Court stated:

"The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" 290 U.S. at page 32.

books and court opinions.[3] Appellants contend that these regulations violate the due process and equal protection clauses of the Fourteenth Amendment in that they seriously infringe their rights of access to the courts and discriminate between indigent and affluent prisoners (in that the latter can obtain outside counsel for legal research, thus gaining effective access to the courts).

In our judgment the constitutional questions thus posed cannot be said to be plainly unsubstantial under the *Poresky* standards. Courts are currently struggling with the question of the extent of a prisoner's rights to have access to legal materials, e.g., our opinion in *Hatfield v. Bailleaux*, 290 F.2d 632 (9th

---

[3]These regulations are as follows:

"330.941. There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

1. The California Penal Code
2. The California Welfare and Institutions Code
3. The California Health and Safety Code
4. The California Vehicle Code
5. The United States and California Constitutions
6. A recognized law dictionary (such as Black's)
7. Witkin's California Criminal Procedures (Bender Moss Co.)
8. Subscription to California Weekly Digest
9. California Rules of Court
10. Rules of the United States Court of Appeals (Ninth Circuit)
11. Rules of the United States Supreme Court

330.042 Sufficient copies will be maintained to provide reasonable access on not less than a weekly basis.

330.043 All State owned law books and references will be maintained in a suitable place and no State owned books or references are to be removed from the designated 'law library,' except to administrative segregation units as scheduled.

330.044 Inmates will not be permitted to purchase or receive personally owned law books or reference material.

330.045 Inmates may receive or purchase a single copy of an opinion or decision in their own case (commonly known as 'slip opinions') and retain it in their own possession. • • •"

Cir.), *cert. denied,* 368 U.S. 862 (1961). The Supreme Court has not yet spoken on the subject and the law can hardly be said to be settled.

We conclude that the District Court was in error in its ruling that no substantial question of constitutional law was presented.

Appellees urge affirmance upon two additional grounds.

First, they contend that the regulations in question were not those of an "administrative board or commission" under §2281, but rather were promulgated by one man—the State Director of Correction.

We find no merit in this distinction. While the statute making provisions for three-judge courts is to be regarded as "an enactment, technical in the strict sense of the term and to be applied as such," *Phillips v. United States,* 312 U.S. 246, 251 (1941), still, as the Court in that case recognized, "The crux of the business is procedural protection against improvident statewide doom by a federal court of a state's legislative policy." 312 U.S. at page 251.

The regulation here is statewide in its application and is as effective and authoritative in its establishment of state policy as if it had been announced by a board of more than one member. See *McCormick & Co. v. Brown,* 52 F.2d 934, 937 (4th Cir. 1931), *aff'd* (without noting the particular point), 286 U.S. 131 (1932).[4]

---

[4]In *Herkness v. Irion,* 278 U.S. 92 (1928), the Court considered a regulation promulgated by a single person without commenting on that fact.

Second, appellees contend that appellant's motion for a three-judge court was properly denied since the complaint not only attacks the regulation promulgated by the State Director of Corrections but also, and primarily, is directed at certain prison practices allegedly followed at San Quentin which are not statewide in application and not properly the subject of three-judge court jurisdiction.

This, however, is no justification for refusal to convene a three-judge court as to the tendered issues which are properly within its jurisdiction. Remaining issues can be withheld for single-judge determination. See Wright, *Federal Courts,* 165 (1963).

Reversed and remanded with instructions that the order be set aside and for further proceedings looking toward the convening of a three-judge court.

Original Filed Feb. 9, 1970
Clerk, U.S. Dist. Court, San Francisco

United States District Court
Northern District of California

Civil Nos. 45878, 46297, 46298, 46299, 47015, 45749, 47111

Robert O. Gilmore, Jr., John Van Geldern, et al., Plaintiffs,

vs.

Thomas C. Lynch, Attorney General of California, et al., Defendants.

STIPULATION OF SETTLED STATEMENT OF ISSUES

Plaintiffs and defendants, by and through their respective counsel, hereby stipulate and agree that all motions heretofore filed, by counsel for any party to this action, shall be considered as filed as part of this settled statement of issues, and that the three-judge Court, heretofore convened in this matter, may decide all such motions heretofore filed in this matter on the basis of this settled statement of issues.

Plaintiffs and defendants further stipulate and agree, that the Court may enter judgment, and grant

relief, as expressly agreed upon the Court's deciding each issue stated herein.

Issue Number:

1. Are the present State-wide rules and regulations of the California Department of Corrections, governing access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments, and pleadings, an unconstitutional infringement on prisoner access to the courts in so far as these rules and regulations affect indigent State prisoners?

2. Are the present State-wide rules and regulations of the California Department of Corrections, governing access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments, and pleadings, an unconstitutional deprivation of equal protection of the laws in so far as these rules and regulations affect indigent State prisoners?

3. Are the present State-wide rules and regulations, governing legal assistance, given by one State prisoner to another in California penal institutions, a violation of the rule of *Johnson v. Avery*, 393 U.S. 483 (1969)?

4. Are the present State-wide rules and regulations governing access by prisoners in California penal institutions to books in the State law library, an unconstitutional deprivation of access to the courts

in so far as these rules and regulations affect indigent State prisoners?

5. Are the present State-wide rules and regulations governing access by prisoners in California penal institutions to books in the State law library, an unconstitutional deprivation of the rights of indigent prisoners to equal protection of the laws?

Plaintiffs and defendants, by and through their respective counsel, further stipulate and agree that all other issues in this matter, may be decided by a single judge, or a single judge and a jury, should any party request jury trial.

Plaintiffs and defendants, by and through their respective counsel, further stipulate and agree that the Court may confine its perusal of the record, if it please the Court, in deciding the above issues, to the sections of the record or other proof designated in briefs filed by each side and by amicus, in support of their respective positions on the issues set forth above. It is further stipulated that each side shall have to and including February 2, 1970 to file such a brief, and that matter in reply to each brief may be presented in oral argument.

Plaintiffs and defendants, by and through their respective counsel, further stipulate and agree that the following relief may be granted by the Court, if it please the Court, if the Court decides the issues above stated, in the manner indicated.

Relief To Be Granted Upon Decision Of Issue, and Issue Number:

1. If the Court decides the question embodying Issue No. 1 in the affirmative, then the provisions of Department of Corrections' Transmittal Letter 26/66, having to do with access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments and pleadings, shall be declared to be an unconstitutional infringement on prisoner access to the courts, in so far as the said Transmittal Letter affects indigent state prisoners, and the defendants, and each of them, shall be enjoined and restrained from enforcing such provisions of the said Transmittal Letter; the defendants, and each of them, shall be further enjoined and restrained from prohibiting inmates of California penal institutions from possessing law books or legal opinions, or other materials utilized in preparation of legal petitions, arguments, and pleadings, except in so far as the defendants, or any of them, may regulate inmate possession of books in general because of space limitations or fire hazard; and shall be further enjoined and restrained from establishing exclusive, standardized lists of law books for all prison law libraries, and from destroying or removing from prison law libraries any existing law books, except as such books become useless because of excessive wear or mutilation.

If the Court decides the question embodying Issue No. 1 in the negative, then the Court shall declare that the Department of Corrections' Transmittal

Letter 26/66 is not an unconstitutional infringement on prisoner access to the courts in so far as the said Transmittal Letter affects indigent State prisoners.

2. If the Court decides the question embodying Issue No. 2 in the affirmative, then the provisions of Department of Corrections' Transmittal Letter 26/66, having to do with access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments and pleadings, shall be declared to be an unconstitutional deprivation of equal protection of the laws, in so far as the said Transmittal Letter affects indigent state prisoners, and the defendants, and each of them, shall be enjoined and restrained from enforcing such provisions of the said Transmittal Letter; the defendants, and each of them, shall be further enjoined and restrained from prohibiting inmates of California penal institutions from possessing law books or legal opinions, or other materials utilized in preparation of legal petitions, arguments, and pleadings, except in so far as the defendants, or any of them, may regulate inmate possession of books in general because of space limitations or fire hazard; and shall be further enjoined and restrained from establishing exclusive, standardized lists of law books for all prison law libraries, and from destroying or removing from prison law libraries any existing law books, except as such books become useless because of excessive wear or mutilation.

If the Court decides the question embodying Issue No. 2 in the negative, then the Court shall declare

that the Department of Corrections' Transmittal Letter 26/66 is not an unconstitutional deprivation of equal protection of the laws in so far as the said Transmittal Letter affects indigent State prisoners.

3. If the Court decides the question embodying Issue No. 3 in the affirmative, then the defendants, and each of them, shall be restrained and enjoined from prohibiting any inmate from possessing the legal materials of another inmate, when those legal materials are freely given by the inmate owning them, and when they are possessed for the purpose of rendering legal assistance, without charge or condition of any kind, to the inmate owning the said legal materials.

If the Court answers the question embodying Issue No. 3 in the negative, then the present State-wide rules and regulations governing legal assistance, given by one State prisoner to another in California penal institutions, shall be declared not to be any violation of the rule of *Johnson v. Avery*, 393 U.S. 483 (1969).

4. If the Court answers the question embodying Issue No. 4 in the affirmative, then the defendants, and each of them, shall be restrained and enjoined from not allowing prisoners to receive all of the law books which the State library has, except for rare books or collector's items, and the defendants, and each of them, shall be further enjoined and restrained from prohibiting inmates from possessing more than one law book from the State library at a time, and the defendants shall be further restrained and en-

joined from treating requests by prisoners for law books from the State library with lower priority than other requests for law books received by the State library.

If the Court answers the question embodying Issue No. 4 in the negative, then the present State-wide rules and regulations governing access by prisoners in California penal institutions to books in the State law library shall be declared not to be an unconstitutional deprivation of access to the courts in so far as these rules and regulations affect indigent State prisoners.

5. If the Court answers the question embodying Issue No. 5 in the affirmative, then the defendants, and each of them, shall be restrained and enjoined from not allowing prisoners to receive all of the law books which the State library has, except for rare books or collector's items, and the defendants, and each of them, shall be further enjoined and restrained from prohibiting inmates from possessing more than one law book from the State library at a time, and the defendants shall be further restrained and enjoined from treating requests by prisoners for law books from the State library with lower priority than other requests for law books received by the State library.

If the Court answers the question embodying Issue No. 5 in the negative, then the present State-wide rules and regulations governing access by prisoners in California penal institutions to books in the State law library shall be declared not to be an unconsti-

tutional deprivation of the rights of indigent prisoners to equal protection of the laws.

It is further stipulated that the attached Appendices contain the prison and library rules and regulations constituting the subject matter of the issues presented for consideration by the three-judge court. Appendix A consists of the precise rules and regulations, the validity of which is in issue in their present form; Appendix B consists of Transmittal Letter No. 26/66, all material modifying its terms, and all material modifying other prison rules and regulations challenged in the Amended Complaint filed in the instant action.

Dated, January ....., 1970.

Thomas C. Lynch
Attorney General of California

Robert R. Granucci
Deputy Attorney General

George R. Nock
Deputy Attorney General
Attorneys for Defendants

John Eshleman Wahl
Attorney for Plaintiffs

Appendix A

DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE MANUAL (Paragraphs)

330.041

There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

1. The California Penal Code
2. The California Welfare and Institutions Code
3. The California Health and Safety Code
4. The California Vehicle Code
5. The United States and California Constitutions
6. A recognized law dictionary (such as Black's)
7. Witkin's California Criminal Procedures (Bender Moss Co.)
8. Subscription to California Weekly Digest
9. California Rules of Court
10. Rules of United States Court of Appeals (Ninth Circuit)
11. Rules of United States Supreme Court

330.042

Sufficient copies will be maintained to provide reasonable access on not less than a weekly basis.

330.043

All State owned law books and references will be maintained in a suitable place and no State owned books or references are to be removed from the des-

ignated "law library", except to administrative segregation units as scheduled.

330.051

In accordance with the Rules of the Director of Corrections, inmates may have legal material challenging their conviction or commitment typed by an established inmate typing pool under supervision of appropriate staff. Appropriate consideration will be given to time limits for filings. Multiple copies of petitions will be prepared for the State Supreme Court and for other courts as required. Photostatic copies of legible handwritten material will be acceptable unless otherwise directed by a court on an individual basis.

330.052

Forms required by the State or Federal courts will be provided without charge. Inmates will be required to pay for postage, paper and envelopes for all legal documents.

330.054

The responsibility for mailing legal documents will rest with the individual inmate. A legal mail box will be provided for this purpose. Mail will be picked up on each work day for delivery to the institution mail room for inspection and mailing not later than the following work day.

330.056

Inmates in the isolation unit will be allowed pencil and paper for the purpose of preparing a Writ of Habeas Corpus or corresponding with an attorney.

330.06 *State Library—*

Services of the State Law Library will be continued.

State of California
Department of Corrections
Sacramento 95814
January 12, 1967

Transmittal Letter No. 1/67

To: Wardens and Superintendents; Deputy Director, Correctional Conservation Camp Services Division; Chief, Parole and Community Services Division; and Staff Members

Subject: Department of Corrections Administrative Manual Change

Section 330, Legal Papers, Paragraph 330.07, is added to permit assistance by personnel to inmates who are illiterate or otherwise physically incapable of preparing their own petitions for Habeas Corpus or Modification of Custody.

Pursuant to discussion during the recent Wardens and Superintendents Conference, each institution is encouraged to explore the possibilities of obtaining free legal assistance to inmates through law schools or other sources in their area. Plans for such assistance are to be submitted to the Director for review before any firm commitments are made.

Walter Dunbar
Director of Corrections

Attachment

DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE MANUAL (Paragraph)

330.07 *Assistance to Inmates—*
In accordance with Director's Rule D5218, Petitions and Writs, employees shall not assist in the preparation of a petition for executive clemency or in the preparation of writs unless specifically directed to do so by the institutional or division head. In order that inmates who are illiterate or otherwise physically incapable of preparing documents themselves for recourse to the courts, each institution will make provision for assistance in the preparation of forms adopted under rules of the United States courts and by the Judicial Council of California for petitions for Habeas Corpus or Modification of Custody.

DIRECTOR'S RULES

D2601. *LAW BOOKS.* The use of institution law books by inmates is a privilege which may be withdrawn upon misuse. State-owned law books are not to be removed from the designated place of study. Personally-owned law books shall be limited by local regulations to the availability of space for personal property in the inmate's quarters. Law books in excess of this limitation may be donated to the library, sent home or destroyed, whichever the inmate prefers.

D2602. *INMATE ASSISTANCE.* One inmate may assist another inmate in the preparation of legal documents, but may not receive remuneration therefor. Remuneration is not limited to present benefits, but

includes future as well as past benefits. A room or rooms may be designated by the Warden or Superintendent for this purpose. All briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain.

D2604. *MATERIAL.* Forms required by the state or federal courts will be provided without charge. You will be required to pay for postage, paper, envelopes, and all other materials except the forms previously mentioned.

State of California
Department of Corrections
Sacramento 95814

May 9, 1969

Transmittal Letter No. 5/69

To: Wardens and Superintendents, Deputy Directors, and Staff Members

Subject: Department of Corrections' Administrative Manual Revision

Section 330, Legal Papers, Paragraph 330.044, regarding the purchase of personally owned law books, and Paragraph 330.045, regarding "slip opinions" and legal documents containing cumulative case summary information, are eliminated.

Please see that all personnel concerned are informed of the above.

R. K. Procunier
Director of Corrections

State of California

MEMORANDUM

Date: September 25, 1969

To: Superintendent, California Conservation Center
Superintendent, California Correctional Institution
Superintendent, California Institution for Men
Superintendent, California Institution for Women
Superintendent, California Medical Facility
Superintendent, California Men's Colony
Superintendent, California Rehabilitation Center
Superintendent, Correctional Training Facility
Superintendent, Duel Vocational Institution
Superintendent, North Coast Conservation Center
Superintendent, Sierra Conservation Center
Superintendent, Southern Conservation Center
Warden, Folsom State Prison
Warden, San Quentin State Prison

Subject: Inmate Legal Assistance

From: Department of Corrections, Sacramento 95814

Pursuant to Director's Rule D2601, one inmate may assist another inmate in the preparation of legal documents.

In order that inmates in Adjustment Centers and Segregation Units might receive assistance, upon request of one inmate another inmate from within the unit of assignment may be permitted to confer with and assist in the preparation of legal documents or discussion of legal problems.

The time for such assistance may be limited to a reasonable period such as one hour per day, three days per week.

The selection of such assistance may be controlled to avoid undesirable associations or known custodial hazards.

Please ascertain that personnel in charge of the above units are advised of this procedure.

R. K. Procunier
Director of Corrections

California State Library
Law Library
Library and Courts Bldg.
Sacramento, California 95809

INFORMATION FOR PRISON LIBRARIANS

The following sets *only* are available for circulation to prison inmates:

Title	*Abbreviation*
California Appellate Reports	CA
California Appellate Reports, 2d Series	CA 2d
California Reports	C
California Reports, 2d Series	C 2d
California Reporter	C Rptr
Pacific Reporter	P
Pacific Reporter, 2d Series	P 2d
Federal Reporter	F
Federal Reporter, 2d Series	F 2d
Federal Rules Decisions	FRD
Federal Supplement	F Supp
United States Reports	US
Supreme Court Reporter	SCt
U.S. Supreme Court Reports, Lawyers Edition	L Ed
Lawyers Edition, 2d Series	L Ed 2d
California Codes (State Pamphlet editions only)	

California Statutes and Amendments
to the Codes Cal Stats

Note: SCt. Us, and L Ed contain the same cases. C & CA cases are found in P until 1960. After 1960 C cases are found in C Rptr and P, CA in C Rptr.

We return cards for several reasons:

Out in circulation—Either out circulating or a duplicate request: we do not reserve books for inmates.

Not in State Library—Incomplete set for prison circulation. (See attached page for listing of missing volumes)

Return for more complete information—Incorrect citation or insufficient information.

Not for circulation—Does not circulate to inmates: requests for staff should be marked "Staff" with name.

Your cooperation and assistance will help us give the best possible service with limited staff and time.

Please: Do not request anything not listed above, except for "Staff".

Do not send in more than 5 requests per man each week, or more than one request for a particular volume: we only have one copy.

Mark volume number and abbreviation of title in the upper left-hand box marked "Call number", with one card for each volume.

Sort cards by report title and volume number, from low to high.

Send in all your requests together once a week.

Thank you

Volumes lacking from prison library collection
July 1967

Title	*Volumes Missing*
CA	29, 103
CA 2d	45, 112
C	29, 49, 61, 74, 83, 101, 152
C 2d	5, 6, 28, 44, 52, 55, 58, 62
C Rptr	5, 8, 14, 26
P	58, 202, 209, 210
P 2d	284, 371, 382, 400
F 2d	43, 152, 156, 310, 343
FRD	3, 33, 34, 35
F Supp	53, 246
US	1-4, 17-18, 23-24, 66, 68, 83, 114, 168, 188, 190-192, 194-195 197-201, 203-204, 228-259, 262-263, 265-283, 287, 308-309, 323, 328 338, 346, 354, 356-357, 359-360, 371, 378, 380
SCt	1-7, 14-36, 39-41, 47, 52, 65, 73, 78, 79, 81, 81A, 82, 82A, 84, 84A
L Ed	27-82, 84, 86, 96
L Ed 2d	2, 6, 10

Appendix B

Human Relations Agency

State of California

MEMORANDUM

Date: December 23, 1969

To: The Honorable Thomas C. Lynch
Attorney General
Department of Justice

Attention: Mr. George R. Nock, Jr.
Deputy Attorney General

From: Department of Corrections,
Sacramento 95814

Pursuant to your request, we are forwarding the following documents:

Exhibit 1: Transmittal Letter No. 26/66 containing changes in Administrative Manual Sections 155, 330, 330.0311, removing Sections 330.032 and 330.033, and adding Sections 330.04, 330.042 through 330.044, 330.045, 330.05, 330.051 through 330.058 and 330.06.

Exhibit 2: Director's Rule D2605 in effect September 19, 1966, and referred to in Transmittal Letter 26/66 (included on pages 28 and 29 of Director's Rules issued 1960).

Exhibit 3: Director's letter of November 10, 1966, modifying the last sentence of the sixth paragraph of Transmittal Letter 26/66.

Exhibit 4: Transmittal Letter 1/67 containing instructions regarding assistance to illiterate or incapable inmates and transmitting additions to Administrative Manual Section 330 regarding processing inmate petitions and writs.

Exhibit 5: Chapter II, Article 6, of Director's Rules issued 1967, Policy Regarding Legal Documents, including Rules D2605 and D5217 which is former Rule D2605.

Exhibit 6: Transmittal Letter DR/4 containing a revision of Chapter II, Article 6, of the Director's Rules and eliminating Rule D5217.

Exhibit 7: Transmittal Letter 5/69 containing revisions eliminating paragraphs 330.044, regarding the purchase of law books, and 330.045, regarding the purchase of "slip opinions".

Exhibit 8: Director's letter of September 25, 1969, regarding inmates assisting each other in the preparation of legal documents.

I certify under penalty of perjury that the attached exhibits are true and correct copies of the originals on file in the office of the Director of Corrections.

/s/ A. G. Oakley
Assistant to the Director

AGO:sb
Attachments (8)

Exhibit 1

State of California
Department of Corrections
Sacramento 14

September 19, 1966

Transmittal Letter No. 26/66

To: Wardens and Superintendents; Deputy Director, Correctional Conservation Camp Services Division; Chief, Parole and Community Services Division; and Staff Members

Subject: Department of Corrections Administrative Manual Change

Section 155, Civil Rights, Paragraph 155.01 through 155.019 are revised to correct the names and references.

Section 155, Civil Rights, Paragraph 155.02 is added to clarify the need for restoration of civil rights for Federal actions.

Section 330, Legal Papers, is revised as follows:

Paragraph 330.0311 is revised.

Paragraphs 330.032 and 330.033 are removed.

Paragraph 330.04, Law Books and References, is added to specify a uniform list of law books and references to be made available in each institution. These books are to be obtained from existing funds and all existing law books and references in inmate law

libraries not consistent with this section are to be removed and destroyed.

Paragraphs 330.042 through 330.044 are added to provide policy for the library. Paragraph 330.045 is added to preclude personally owned law books and to generally exclude personally owned copies of opinions and decisions.

Paragraph 330.05, Processing Inmate Petitions and Writs, is added.

Paragraphs 330.051 through 330.058 are added to set forth policy for processing inmate legal documents and the payment of postage. Director's Rule D2605 has been revised to provide for these procedures and to eliminate review by the institution head or his representative prior to mailing.

Paragraph 330.06 is added to provide for the continued use of the State Law Library.

Please see that all personnel concerned are informed of the above.

Walter Dunbar
Director of Corrections

Attachments

Section 155

REV.
Par.

155.01 *Restoration of civil rights to adult inmates*—

Civil rights lost by prison inmates under Sections 2600 and 2601 of the Penal Code may, with a few exceptions, be restored by action of the Adult Authority or the Women's Board of Terms and Parole under those same sections. These exceptions, in brief, cover a general power of attorney, the right to act as a trustee or hold public office or exercise the privileges of an elector. The latter three rights may be restored only through pardon action by the Governor.

While certain specified acts, including the sale or conveyance of property, may not require restoration of civil rights, the products of a prisoner's efforts and activities belong to him only with the permission or at the sufferance of the prison authorities. It is the policy of the Department that prisoners while confined not be permitted to convey instructions or material which contribute to the operation of a private business.

REV.
155.011

In accordance with a policy agreed upon by the Director of Corrections and the Boards, all applications for restoration of civil rights not covered by Resolutions will be screened by the appropriate Board and the Warden or institution head

in question will be informed as to whether or not the request falls within the policy of that Board. If restoration is necessary, the Board will advise the institution head of the action which it has taken on each matter.

Par.

155.0111 *Sample request form, inmate's request—*

Below is a sample of form to be used when inmate makes a request for restoration of civil rights. This form will be followed as closely as the circumstances of the case permits. Information to be inserted shall be typewritten.

Warden.....:

Will you please obtain for me whatever authority is necessary to sign the following documents:

(Check of John Doe (Attorney) on ..... State Bank, Texas for $..... being proceeds of my father's estate.)

My purpose for this request is as follows:

(To send the check to my mother, Fannie S. Smith, ... St. and No., ... City, ... State, to cash and use the proceeds.)

The money or property involved in this contemplated act has no connection with my present offense which is:

(List applicable offense, citing Code Section.)

Signature (Inmate's name)
Prison No. (Inmate's number)
Date .....

(Send to my mother
400 E. Calif. Blvd.
Ontario, California)

Par.

155.012

No request for restoration of civil rights is necessary on matters covered under Section 2603 of the Penal Code since the law itself makes an exception in certain instances. For example, a Deed of Trust or a Quit Claim Deed is a conveyance of property and inmates may file such documents without the formality of having their civil rights restored.

155.013

The United States Constitution guarantees the right of an inmate to file a Writ of Habeas Corpus, which right is not dependent on the restoration of any civil rights. Such right, however, is limited to applications for habeas corpus and/or other legal proceedings attacking the legality of an inmate's imprisonment. See Administrative Manual Paragraph 330.031.

REV.

155.0131

Applications for permission to bring civil suits or similar legal actions in a state court must be made to the appropriate Board. When an application is submitted to the Warden or Superintendent and he is in doubt as to whether or not restoration of civil rights is required, it should be referred to the appropriate Board for determination.

REV.

155.014

All requests made by institution inmates for restoration of civil rights under Sections 2600 and 2601 of the Penal Code not covered by Resolutions, therefore will be transmitted by the Wardens and Superintendents to the Board direct.

REV.
155.015

Actions taken by the Board thereon will be transmitted direct to the Wardens and Superintendents.

REV.
155.016

Such requests shall be directed to the chairman of the appropriate Board and shall include the following:

155.0161

The inmate's signed request for restoration of civil rights.

Par.
155.0162

All documents and correspondence relating to the exercise of civil rights in question.

REV.
155.0163

A letter of transmittal from the Warden or Superintendent or his designated representative giving pertinent information as to the date of commitment, offense committed, sentence, county of commitment, subsequent actions by the Boards relating to the fixing of terms and granting of parole and a statement as to whether the present request is related in any way to the offense on which the inmate was committed.

REV.
155.017

Certain documents and correspondence (if essential to an understanding of such documents) relating to the exercise of the civil right in question, shall be forwarded to the Board's adminis-

trative office in duplicate if they are prepared at the institution or if an extra copy can be secured when they are prepared on the outside. This requirement applies to (1) petitions for writs, (2) contracts and leases, (3) agreements, (4) special powers of attorney (not including standard forms issued by government agencies), (5) petitions in bankruptcy, and (6) any document of an unusual nature not covered by Resolutions. The extra copies are required for the Board's file in support of the action taken.

REV.
155.018

In order to expedite the handling of recurring inmate's requests for restoration of civil rights of a noncontroversial nature, the Boards have adopted Resolutions giving blanket permission to inmates and parolees to exercise certain civil rights as listed in the Resolution. Reference should be made constantly to this Resolution by the staff involved in the handling of requests for restoration of civil rights.

REV.
155.019

It is pointed out that under Section 2602 of the Penal Code a prisoner sentenced to death is deemed civilly dead during the existence of the death sentence and the Boards cannot restore civil rights to such persons.

Par.
ADD
155.02

The filing of a civil action in a Federal court does not require the restoration of civil rights.

LEGAL PAPERS

Section 330

Par.

330.02 *Serving of legal papers in institutions—*

No charge will be made for the serving of legal papers on the inmates confined in institutions under the jurisdiction of the Director of Corrections. If a fee accompanies the request for service, said fee will be returned to the sender. This in no way precludes the proper serving of papers on inmates in the institution by the proper officials appearing in person at the institution. However, if a request for service is mailed in then, the institution officials will serve the same.

330.03 *Preparation of legal documents by inmates—*

See Article 6, Chapter II, Legal Documents, in the Rules and Regulations of the Director of Corrections.

330.031

Inmates shall be allowed to mail out writs or petitions for writs concerning the legality of their imprisonment directly to the court indicated in the writ or petition for a writ without regard to the form or content of the document.

REV.

330.0311

Section 2015.5 of the Code of Civil Procedures as added by the 1957 Statutes provides as follows: "Whenever, under any law of this State or under any rule, regulation, order or requirement made pursuant to law, any matter is required or permitted to be evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath or affidavit, in writing of the person

making the same, (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person stating the date and place of execution, and which is subscribed by him and certified or declared by him to be true 'under penalty of perjury', which certification or declaration may be in substantially the following form:

I certify (or declare) under penalty of perjury that the foregoing is true and correct."

Documents filed in accordance with Federal laws or with the laws of other states will still require certification before a notary public. Section 118 of the California Penal Code provides a penalty for making a false statement under the provisions described above.

ADD

330.04 *Law books and references—*

ADD

330.041

There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

1. The California Penal Code
2. The California Welfare and Institutions Code
3. The California Health and Safety Code
4. The California Vehicle Code
5. The United States and California Constitutions

6. A recognized law dictionary (such as Black's)
7. Witkin's California Criminal Procedures (Bender Moss Co.)
8. Subscription to California Weekly Digest
9. California Rules of Court
10. Rules of United States Court of Appeals (Ninth Circuit)
11. Rules of United States Supreme Court

ADD

330.042

Sufficient copies will be maintained to provide reasonable access on not less than a weekly basis.

ADD

330.043

All State owned law books and references will be maintained in a suitable place and no State owned books or references are to be removed from the designated "law library", except to administrative segregation units as scheduled.

ADD

330.044

Inmates will not be permitted to purchase or receive personally owned law books or reference material.

ADD

330.045

Inmates may receive or purchase a single copy of an opinion or decision in their own case (commonly known as "slip opinions") and retain it in their own possession. Legal documents such as a return on an order to show cause which contain cumulative case summary information

will be placed in the inmate's property and made available for reference under supervision.

ADD

330.05 *Processing inmate petitions and writs—*

ADD

330.051

In accordance with the Rules of the Director of Corrections, inmates may have legal material challenging their conviction or commitment typed by an established inmate typing pool under supervision of appropriate staff. Appropriate consideration will be given to time limits for filings. Multiple copies of petitions will be prepared for the State Supreme Court and for other courts as required. Photostatic copies of legible handwritten material will be acceptable unless otherwise directed by a court on an individual basis.

ADD

330.052

Forms required by the State or Federal courts will be provided without charge. Inmates will be required to pay for postage, paper and envelopes for all legal documents.

ADD

330.053

A current list of addresses of the various courts will be provided in an available location. Notary services will be provided for Federal or out-of-state documents.

ADD

330.054

The responsibility for mailing legal documents will rest with the individual inmate. A legal mail

box will be provided for this purpose. Mail will be picked up on each work day for delivery to the institution mail room for inspection and mailing not later than the following work day.

ADD

330.055

Each piece of legal mail addressed to a court which requires the addition of postage will be accompanied by a signed form CDC 193, Trust Account Withdrawal Order. The mail room will remove the Withdrawal Order, enter the amount of postage and forward the form to the Trust Office at designated intervals. The Trust Office will post the amount of postage to the inmate's Trust Account card as a deduction to the extent that funds are available. The mail room officers will examine the content of the envelope for contraband or contraband mail, seal the envelope and send it out. The Mail Card will reflect the mailing date of all legal material. There will be no review of the contents of legal mail by personnel except in occasional specific instances for custodial reasons.

ADD

330.056

Inmates in the isolation unit will be allowed pencil and paper for the purpose of preparing a Writ of Habeas Corpus or corresponding with an attorney.

ADD

330.06 *State Library—*

Services of the State Law Library will be continued.

Exhibit 2

DIRECTOR'S RULES

Chapter II, Article 5 (cont'd)

4. Any material which appears to glorify crime or delinquent conduct or which deals with the technique of committing crimes.

5. Any material which might be offensive to any race, nationality, religious faith, political party or other group of citizens.

6. Reference to the fact that the writter is an inmate of a State Prison or is a parolee therefrom.

D2503. Manuscripts of Inmates Under Sentence of Death. Prisoners under sentence of death shall not be permitted to submit any manuscript of any kind for sale or for publication.

D2504. Use of Materials in Preparing Manuscripts. No materials purchased with State funds shall be used in the preparation of manuscripts.

Article 6. Legal Documents

D2601. Law Books. There shall be a suitable place in each institution where inmates, with the permission of the designated employee, may have access to study such law books as are available to them. No law books shall be taken from such place by any inmate. The use of law books by inmates in an institution is a privilege, not a right. Misuse of the privilege may result in its withdrawal.

D2602. Inmate Assistance. No inmate shall assist or receive assistance from another in the preparation of legal documents. Any brief or petition not pertaining to his own case found in the possession of an inmate shall be confiscated. If an inmate does not have his own typewriter, he may arrange, through proper channels, to have his legal documents typed.

D2603. False Statements or Perjury in Legal Documents. Any inmate who submits a [28] document containing a false statement and which is notarized or certified as true and correct under penalty of perjury, is subject to disciplinary action.

D2604. Material. All paper and other material used for legal documents shall be purchased by the inmate. Exception must first be approved by the institutional head.

D2605. Disposal of Legal Documents. All legal papers, incoming and outgoing, shall be sent to the institutional head or his designated representative, and shall not be mailed or otherwise released without his written authorization.

Article 7. Visiting

Policy Regarding Visits

Visits by family members, desirable friends, business associates and former or prospective employers, contribute to the morale and treatment of inmates. The Department of Corrections encourages such wholesome visits and provides the means, compatible with security, for such visits.

D2701. Visits A Privilege. Receiving visits is a privilege, not a right, and is subject to restriction or forfeiture.

D2702. Visits to Inmates. The institutional head, with the approval of the Director, shall establish visiting regulations, not inconsistent or in conflict with the following:

1. A suitable place within the institution shall be provided for inmate visits. Except by permission of institutional head, no inmate shall be visited elsewhere.
2. Any inmate who does not wish to see a visitor shall be requested to refuse such visit in writing and in any case a notation shall be made in the record of such refusal. [29]

Exhibit 3

State of California
Department of Corrections
State Office Building No. 1
Sacramento 14

November 10, 1966

Supt. Iverne R. Carter, Frontera
Supt. H. M. Comstock, Sierra Conservation Center
Supt. H. Field, Los Padres
Supt. C. J. Fitzharris, Soledad
Deputy Supt. W. G. Black, Soledad
Supt. W. D. Achuff, So. Conservation Center
Supt. G. P. Lloyd, Tehachapi
Supt. E. J. Oberhauser, Chino
Warden A. L. Oliver, Folsom
Supt. R. K. Procunier, Tracy
Supt. M. Schneckloth, Conservation Center
Warden Lawrence E. Wilson, San Quentin
Supt. Roland Wood, Calif. Rehab. Center
Acting Supt. L. J. Pope, Vacaville
Subject: Law Libraries

Please refer to Transmittal Letter No. 26/66 issued September 19, 1966.

Pending further instructions from this office, the existing law books and references in inmate libraries which were to be replaced by the listing set forth in Administrative Manual Section 330.04 are not to be destroyed.

/s/ Walter Dunbar,
Director of Corrections

Exhibit 4

State of California
Department of Corrections
Sacramento 95814

January 12, 1967

Transmittal Letter No. 1/67

To: Wardens and Superintendents; Deputy Director, Correctional Conservation Camp Services Division; Chief, Parole and Community Services Division; and Staff Members

Subject: Department of Corrections Administrative Manual Change

Section 330, Legal Papers, Paragraph 330.07, is added to permit assistance by personnel to inmates who are illiterate or otherwise physically incapable of preparing their own petitions for Habeas Corpus or Modification of Custody.

Pursuant to discussion during the recent Wardens and Superintendents Conference, each institution is encouraged to explore the possibilities of obtaining free legal assistance to inmates through law schools or other sources in their area. Plans for such assistance are to be submitted to the Director for review before any firm commitments are made.

Walter Dunbar,
Director of Corrections

Attachment

DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE MANUAL

SEPT. 19, 1966 TL 26/66

LEGAL PAPERS

Section 330

ADD

330.05 *Processing inmate petitions and writs—*

ADD

330.051

In accordance with the Rules of the Director of Corrections, inmates may have legal material challenging their conviction or commitment typed by an established inmate typing pool under supervision of appropriate staff. Appropriate consideration will be given to time limits for filings. Multiple copies of petitions will be prepared for the State Supreme Court and for other courts as required. Photostatic copies of legible handwritten material will be acceptable unless otherwise directed by a court on an individual basis.

ADD

330.052

Forms required by the State or Federal courts will be provided without charge. Inmates will be required to pay for postage, paper and envelopes for all legal documents.

ADD

330.053

A current list of addresses of the various courts will be provided in an available location. Notary services will be provided for Federal or out-of-state documents.

ADD

330.054

The responsibility for mailing legal documents will rest with the individual inmate. A legal mail box will be provided for this purpose. Mail will be picked up on each work day for delivery to the institution mail room for inspection and mailing not later than the following work day.

ADD

330.055

Each piece of legal mail addressed to a court which requires the addition of postage will be accompanied by a signed form CDC 193, Trust Account Withdrawal Order. The mail room will remove the Withdrawal Order, enter the amount of postage and forward the form to the Trust Office at designated intervals. The Trust Office will post the amount of postage to the inmate's Trust Account Card as a deduction to the extent that funds are available. The mail room officers will examine the content of the envelope for contraband or contraband mail, seal the envelope and send it out. The Mail Card will reflect the mailing date of all legal material. There will be no review of the contents of legal mail by personnel except in occasional specific instances for custodial reasons.

330.056

Inmates in the isolation unit will be allowed pencil and paper for the purpose of preparing a Writ of Habeas Corpus or corresponding with an attorney.

330.06 *State Library—*

Services of the State Law Library will be continued.

ADD

330.07 *Assistance to Inmates—*

In accordance with Director's Rule D5218, Petitions and Writs, employees shall not assist in the preparation of a petition for executive clemency or in the preparation of writs unless specifically directed to do so by the institutional or division head. In order that inmates who are illiterate or otherwise physically incapable of preparing documents themselves for recourse to the courts, each institution will make provision for assistance in the preparation of forms adopted under rules of the United States courts and by the Judicial Council of California for petitions for Habeas Corpus or Modification of Custody.

Exhibit 5

DIRECTOR'S RULES

Chapter II, Article 6

ARTICLE 6. LEGAL DOCUMENTS

Policy Regarding Legal Documents

It is the policy of the Department to allow inmates every legal access to the courts. The Department, however, is neither equipped nor authorized to assist inmates in their legal efforts. There will be a suitable place in each institution where inmates, with the permission of the designated employee, may have access to study such institution law books as are available to them. Law books are defined to include constitutions, codes, court reports, texts, dictionaries.

D2601. *Law Books.* The use of institution law books by inmates is a privilege which may be withdrawn upon misuse. Do not take law books from the designated place of study. Personally owned law books are not permitted.

D2602. *Inmate Assistance.* Do not assist or receive assistance from another in the preparation of legal documents. Any brief or petition not pertaining to your own case found in your possession will be confiscated. You may have legal material challenging your conviction or commitment typed by an established inmate typing pool under supervision of appropriate staff in those institutions providing such services. Appropriate consideration will be given to time limits for filings.

D2603. *False Statements or Perjury in Legal Documents.* Do not make false statements in any document.

D2604. *Material.* Forms required by the state or federal courts will be provided without charge. You will be required to pay for postage, paper, envelopes, and all other materials except the forms previously mentioned.

D2605. *Procedures.* The mailing of legal documents to courts will be your individual responsibility. A legal mail box will be provided for this purpose and the mail will be picked up each working day for delivery to the institution mail room for inspection and mailing. A current list of addresses of the various courts will be provided and notary services will be provided for federal or out-of-state documents. For each legal piece of mail requiring the addition of postage, you will be required to sign a form CDC 193. Trust Account Withdrawal Order. The mail room will remove this Withdrawal Order, enter the amount of postage and forward it to the Trust Office for posting against available funds. The mail room officer will examine the content of the envelope for contraband or contraband mail, seal the envelope, and send it out daily. This will be posted on the mail card.

D2606. *Legal Matters While in Isolation Unit.* Inmates assigned to the isolation unit will be permitted pencil and paper for the purpose of preparing a legal document or for corresponding with an attorney.

D5216. *Contacting or Corresponding With a Prisoner's Family.* No employee shall contact or correspond with any member of a prisoner's family, nor with any person on an inmate's approved visiting or correspondence list, unless his assigned duties require it, or he has the permission of his division or institutional head. If an employee is deliberately contacted while off duty by a member of a prisoner's family, visitor or correspondent, he shall immediately report the fact to his division or institutional head.

D5217. *Disposal of Legal Documents.* All legal papers incoming and outgoing, shall be sent to the institutional head or his designated representative and shall not be mailed or otherwise released without his written authorization.

D5213. *Petitions and Writs.* Employees shall not assist in the preparation of a petition for executive clemency or in the preparation of writs unless specifically directed to do so by the institution or division head.

D5219. *Commitment of Relatives or Close Friends.* If an employee becomes aware that any relative or close friend has been committed to or transferred to the jurisdiction of the Director of Corrections, the employee shall report it to his division or institutional head immediately.

D5220. *Shop Work for Employees.* Except as provided elsewhere in these rules, no work shall be done in any shop or department of an institution for an employee or other private person.

D5221. *Use of Supplies.* No employee shall consume or use food or supplies purchased or produced for inmate or departmental use, except as he may legally be entitled to do so, or is directed to do so by the institutional head. The Department of Corrections' postage or stamping facilities shall not be used except in the conduct of official business even though the Department is reimbursed.

D5222. *Use of Vehicles.* State vehicles shall be used for official use only, and only such employees as are authorized by the division and/or institutional head shall drive such vehicles. Drivers shall have in their possession a valid operator's license issued by the California Department of Motor Vehicles. When cars are equipped with safety belts, these shall be worn at all times while driving.

At no time shall an inmate be permitted to drive a vehicle on a public road, except in extreme emergency. In each such case a written report giving all details shall be submitted to his supervisor immeditely following the emergency by the affected employee. Any employee who permits an inmate to drive a vehicle on a public road, except in real emergency, may be subject to disciplinary action.

Ignition on all vehicles shall be locked and the keys removed when the vehicle is not in use.

Exhibit 6

State of California
Department of Corrections
Sacramento 95814
March 19, 1969

Revision Letter No. DR/4

To: Wardens and Superintendents, Deputy Directors; and Staff Members

Subject: Department of Corrections' Director's Rule Book Revision

Director's Rule D2406, Use of Personally Owned Typewriters, has been revised to eliminate the statement regarding not assisting another inmate in preparing manuscripts, legal papers, or other written material.

Chapter II, Article 6, Legal Documents, Policy Regarding Legal Documents, is revised to provide for staff assistance to inmates who are illiterate or otherwise physically incapable of preparation of prescribed forms for writs.

Director's Rule D2602, Inmate Assistance, is revised to permit an inmate to assist another inmate in the preparation of legal documents.

Director's Rule D5210, Trading or Bartering, has been revised to include lending with trading or bartering.

Director's Rule D5217, Disposal of Legal Documents, is abolished.

Please see that all personnel concerned are informed of the above.

R. K. Procunier
Director of Corrections

DIRECTOR'S RULES

Chapter II, Article 4

D2405. *Participation in Prize Contests.* You will not be permitted to enter or participate in contests sponsored by radio and television.

REV.

D2406. *Use of Personally Owned Typewriters.* Do not lend typewriters or do another's typing in the preparation of manuscripts, legal papers, or other written material, except as authorized by proper employees. State-owned typewriters shall not be used for the preparation of any personal written material, except as authorized in Rule D2602.

Article 5. Inmate Manuscripts

Submission of Manuscripts

It is the policy of the Department to permit manuscripts, within reasonable limits, to be submitted for publication. Such writings are considered primarily educational activities, having as their purpose the development of skills or talent. Articles must be in good taste and must not be related to the inmate's business or profession. Inmates shall not enter contractual agreements with publishers involving a commitment for a regular published column. Inmates should be encouraged to enroll in courses in creative writing.

D2501. *Manuscripts Defined.* Manuscripts include written musical compositions, articles of fiction, nonfiction, poems, essays, gags, plays, skits, or drawings of any kind.

D2502. *Approval of Manuscripts.* Manuscripts will be submitted in accordance with institutional regulations for review by the designated employee. The Warden or Superintendent shall establish standards for acceptance of meritorious material among which will be the disapproval of that which contains:

1. Plagiarized material.
2. Obvious libelous, lewd, pornographic or inaccurate material.
3. Material criticizing any governmental, judicial, or law enforcement agency or institution, or any personnel connected therewith.
4. Material which appears to glorify crime or delinquent conduct, or which deals with the technique of committing crimes.
5. Material which might be offensive to any race, nationality, religious faith, political party, or other group of citizens.
6. Material in which the inmate attempts to capitalize on his status as an inmate in order to sell his article.

D2503. *Manuscripts of Inmates Under Sentence of Death.* Prisoners under sentence of death shall not be permitted to prepare or submit any manuscript of any kind for sale or for publication.

DR/4
March 19, 1969

D2504. *Use of Materials in Preparing Manuscripts.* Use no state material in the preparation of manuscripts.

D2505. *Percentage to IWF and Retention.* To defray handling costs a percentage established by the Director will be deducted from the payment received for each manuscript and deposited in the Inmate Welfare Fund. A percentage established by the Director will be deducted for deposit in the inmate's retention fund. These percentages will be the same as those established for paintings. Prior to the submission of a manuscript for publication, the inmate will sign an agreement authorizing such deductions.

Article 6. Legal Documents

Policy Regarding Legal Documents
REV.

It is the policy of the Department to allow inmates every legal access to the courts. The Department, however, is neither equipped nor authorized to assist inmates in their legal efforts except to provide staff assistance to inmates, who are illiterate or otherwise physically incapable, in the preparation of forms adopted under rules of the United States Courts and by the Judicial Council of California for petitions for Habeas Corpus or Modification of Custody. There will be a suitable place in each institution where inmates, with the permission of the designated employee, may have access to study such institution law books as are available to them. Law books are defined to include constitutions, codes, court reports, texts, and dictionaries.

D2601. *Law Books.* The use of institution law books by inmates is a privilege which may be with-

drawn upon misuse. State-owned law books are not to be removed from the designated place of study. Personally-owned law books shall be limited by local regulations to the availability of space for personal property in the inmate's quarters. Law books in excess of this limitation may be donated to the library, sent home or destroyed, whichever the inmate prefers.

REV.

D2602. *Inmate Assistance.* One inmate may assist another inmate in the preparation of legal documents, but may not receive remuneration therefor. Remuneration is not limited to present benefits, but includes future as well as past benefits. A room or rooms may be designated by the Warden or Superintendent for this purpose. All briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain.

D2603. *False Statements or Perjury in Legal Documents.* Do not make false statements in any document.

D2604. *Material.* Forms required by the state or federal courts will be provided without charge. You will be required to pay for postage, paper, envelopes, and all other materials except the forms previously mentioned.

D5216. *Contacting or Corresponding With a Prisoner's Family.* No employee shall contact or correspond with any member of a prisoner's family, nor with any person on an inmate's approved visiting or

correspondence list, unless his assigned duties require it, or he has the permission of his division or institutional head. If an employee is deliberately contacted while off duty by a member of a prisoner's family, visitor or correspondent, he shall immediately report the fact to his division or institutional head.

D5218. *Petitions and Writs.* Employees shall not assist in the preparation of a petition for executive clemency or in the preparation of writs unless specifically directed to do so by the institution or division head.

D5219. *Commitment of Relatives or Close Friends.* If an employee becomes aware that any relative or close friend has been committed to or transferred to the jurisdiction of the Director of Corrections, the employee shall report it to his division or institutional head immediately.

D5220. *Shop Work for Employees.* Except as provided elsewhere in these rules, no work shall be done in any shop or department of an institution for an employee or other private person.

D5221. *Use of Supplies.* No employee shall consume or use food or supplies purchased or produced for inmate or departmental use, except as he may legally be entitled to do so, or is directed to do so by the institutional head. The Department of Corrections' postage or stamping facilities shall not be used except in the conduct of official business even though the Department is reimbursed.

D5222. *Use of Vehicles.* State vehicles shall be used for official use only, and only such employees

as are authorized by the division and/or institutional head shall drive such vehicles. Drivers shall have in their possession a valid operator's license issued by the California Department of Motor Vehicles. When cars are equipped with safety belts, these shall be worn at all times while driving.

At no time shall an inmate be permitted to drive a vehicle on a public road, except in extreme emergency. In each such case a written report giving all details shall be submitted to his supervisor immediately following the emergency by the affected employee. Any employee who permits an inmate to drive a vehicle on a public road, except in real emergency, may be subject to disciplinary action.

Ignition on all vehicles shall be locked and the keys removed when the vehicle is not in use.

DR/4
March 19, 1969

Exhibit 7

State of California
Department of Corrections
Sacramento 95814

May 9, 1969

Transmittal Letter No. 5/69

To: Wardens and Superintendents, Deputy Directors, and Staff Members

Subject: Department of Corrections' Administrative Manual Revision

Section 330, Legal Papers, Paragraph 330.044, regarding the purchase of personally owned law books, and Paragraph 330.045, regarding "slip opinions" and legal documents containing cumulative case summary information, are eliminated.

Please see that all personnel concerned are informed of the above.

R. K. Procunier
Director of Corrections

DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE MANUAL

T.L. 5/69 MAY 9, 1969

LEGAL PAPERS

Section 330

Par.

330.02 *Serving of legal papers in institutions*—

No charge will be made for the serving of legal papers on the inmates confined in institutions under the jurisdiction of the Director of Corrections. If a fee accompanies the request for service, said fee will be returned to the sender. This in no way precludes the proper serving of papers on inmates in the institution by the proper officials appearing in person at the institution. However, if a request for service is mailed in then, the institution officials will serve the same.

330.03 *Preparation of legal documents by inmates*—

See Article 6, Chapter II, Legal Documents, in the Rules and Regulations of the Director of Corrections.

330.031

Inmates shall be allowed to mail out writs or petitions for writs concerning the legality of their imprisonment directly to the court indicated in the writ or petition for a writ without regard to the form or content of the document.

330.0311

Section 2015.5 of the Code of Civil Procedure as added by the 1957 Statutes provides as follows:

"Whenever, under any law of this State or under any rule, regulation, order or requirement made pursuant to law, any matter is required or per-

mitted to be evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath or affidavit, in writing of the person making the same, (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person stating the date and place of execution, and which is subscribed by him and certified or declared by him to be true 'under penalty of perjury', which certification or declaration may be in substantially the following form:

I certify (or declare) under penalty of perjury that the foregoing is true and correct."

Documents filed in accordance with Federal laws or with the laws of other states will still require certification before a notary public. Section 118 of the California Penal Code provides a penalty for making a false statement under the provisions described above.

330.04 *Law books and references—*

330.041

There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

1. The California Penal Code
2. The California Welfare and Institutions Code
3. The California Health and Safety Code
4. The California Vehicle Code
5. The United States and California Constitutions
6. A recognized law dictionary (such as Black's)

7. Witken's California Criminal Procedures (Bender Moss Co.)
8. Subscription to California Weekly Digest
9. California Rules of Court
10. Rules of United States Court of Appeals (Ninth Circuit)
11. Rules of the United States Supreme Court

330.042

Sufficient copies will be maintained to provide reasonable access on not less than a weekly basis.

330.043

All State owned law books and references will be maintained in a suitable place and no State owned books or references are to be removed from the designated "law library", except to administrative segregation units as scheduled.

330.05 *Processing inmate petitions and writs—*

330.051

In accordance with the Rules of the Director of Corrections, inmates may have legal material challenging their conviction or commitment typed by an established inmate typing pool under supervision of appropriate staff. Appropriate consideration will be given to time limits for filings. Multiple copies of petitions will be prepared for the State Supreme Court and for other courts as required. Photostatic copies of legible handwritten material will be acceptable unless otherwise directed by a court on an individual basis.

330.052

Forms required by the State or Federal courts will be provided without charge. Inmates will be required to pay for postage, paper and envelopes for all legal documents.

330.053

A current list of addresses of the various courts will be provided in an available location. Notary services will be provided for Federal or out-of-state documents.

330.054

The responsibility for mailing legal documents will rest with the individual inmate. A legal mail box will be provided for this purpose. Mail will be picked up on each work day for delivery to the institution mail room for inspection and mailing not later than the following work day.

330.055

Each piece of legal mail addressed to a court which requires the addition of postage will be accompanied by a signed form CDC 193, Trust Account Withdrawal Order. The mail room will remove the Withdrawal Order, enter the amount of postage and forward the form to the Trust Office at designated intervals. The Trust Office will post the amount of postage to the inmate's Trust Account Card as a deduction to the extent that funds are available. The mail room officers will examine the content of the envelope for contraband or contraband mail, seal the envelope and send it out. The Mail Card will reflect the mailing date of all legal material. There will be no review of the contents of legal mail by personnel except in occasional specific instances for custodial reasons.

330.056

Inmates in the isolation unit will be allowed pencil and paper for the purpose of preparing a Writ of Habeas Corpus or corresponding with an attorney.

330.06 *State Library—*

Services of the State Law Library will be continued.

330.07 *Assistance to Inmates—*

In accordance with Director's Rule D5218, Petitions and Writs, employees shall not assist in the preparation of a petition for executive clemency or in the preparation of writs unless specifically directed to do so by the institutional or division head. In order that inmates who are illiterate or otherwise physically incapable of preparing documents themselves for recourse to the courts, each institution will make provision for assistance in the preparation of forms adopted under rules of the United States courts and by the Judicial Council of California for petitions for Habeas Corpus or Modification of Custody.

State of California

MEMORANDUM

Date: September 25, 1969

To: Superintendent, California Conservation Center
Superintendent, California Correctional Institution
Superintendent, California Institution for Men
Superintendent, California Institution for Women
Superintendent, California Medical Facility
Superintendent, California Men's Colony
Superintendent, California Rehabilitation Center
Superintendent, Correctional Training Facility

Superintendent, Duel Vocational Institution
Superintendent, North Coast Conservation Center
Superintendent, Sierra Conservation Center
Superintendent, Southern Conservation Center
Warden, Folsom State Prison
Warden, San Quentin State Prison

Subject: Inmate Legal Assistance

From: Department of Corrections, Sacramento 95814

Pursuant to Director's Rule D2601, one inmate may assist another inmate in the preparation of legal documents.

In order that inmates in Adjustment Centers and Segregation Units might receive assistance, upon request of one inmate another inmate from within the unit of assignment may be permitted to confer with and assist in the preparation of legal documents or discussion of legal problems.

The time for such assistance may be limited to a reasonable period such as one hour per day, three days per week.

The selection of such assistance may be controlled to avoid undesirable associations or known custodial hazards.

Please ascertain that personnel in charge of the above units are advised of this procedure.

R. K. Procunier
Director of Corrections

In the United States District Court for the Northern District of California

Case No. 45878*

Robert O. Gilmore, Jr., John Van Geldern, et al., Plaintiffs,

vs.

Thomas C. Lynch, Attorney General of California, et al., Defendants.

ORDER GRANTING RELIEF

Before: DUNIWAY, U. S. Circuit Judge, and ZIRPOLI and WOLLENBERG, U.S. District Judges.

Plaintiffs herein are prisoners at various facilities administered by the California Department of Corrections. They challenge certain rules and regulations of the Department concerning inmate access to law books, legal materials, and lay assistance in preparing prisoner writs and complaints. Also attacked are procedures of the California State Law Library regarding circulation of Legal materials to prisoners. Since plaintiffs ask that the enforcement of these

*This case has been consolidated with the following cases: 46297, 46298, 46299, 47015, 47111, 45749, 48232, 48351, 48352, 48353, 48354, 48355, 48361, 48362, 48607, 48858, 48974, 49073, 49090, 49856, 49942, 49943, 50024, 50775, and 50855.

rules be enjoined on constitutional grounds, and since the rules are of state-wide applicability, a three judge court was mandated by the Court of Appeals for this Circuit. *Gilmore v. Lynch,* 400 F.2d 228 (1968); cert. den. *Lynch v. Gilmore,* 393 U.S. 1092 (1968); 28 U.S.C. §2281; *Okla. Gas Co. v. Russell,* 261 U.S. 290 (1923); *Ala. Comm. v. Sthn. Ry. Co.,* 341 U.S. 341, 343 (footnote #3) (1951).

Some of the prison rules originally brought into question by plaintiffs have since been suppressed or amended in response to changed institutional situations and in light of recent court decisions.[1] Others remain, however, and their constitutionality is now before the Court. More specifically, the Court is asked to pass on Prison Regulation 330.041, which establishes an exclusive list of "basic codes and references" for prison use,[2] and Director's Rule 2602, which,

---

[1]Most noteworthy among these decisions is *Johnson v. Avery,* 393 U.S. 483 (1969).

Prisoners who are financially capable of doing so may now purchase law books and other materials for their personal use. Transmittal Letter No. 5/69, dated May 9, 1969, and signed by R. K. Procuner, Director of Corrections. Similarly, more articulate and better educated inmates may assist others in the preparation of legal papers. Director's Rule D2602, as modified.

[2]The Department of Corrections Administrative Manual sets forth the text of Regulation 330.041 as follows:

"There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

(1) The California Penal Code
(2) The California Welfare and Institutions Code
(3) The California Health and Safety Code
(4) The California Vehicle Code
(5) The United States and California Constitutions
(6) A recognized law dictionary (such as Black's)
(7) Witkin's California Criminal Procedures (Bender Moss Co.)

among other provisions, requires that all legal papers remain in the possession of the inmate to whom they pertain.[3] The State Library procedures herein questioned also set up a restricted list of law books available for prison circulations. Evidently, only one copy of each of the listed works is set aside for inmate borrowers, and even a great many of these have been lost or stolen over the years.[4]

---

(8) Subscription to California Weekly Digest
(9) California Rules of Court
(10) Rules of United States Court of Appeals (Ninth Circuit)
(11) Rules of United States Supreme Court

The above regulation is to be read in conjunction with the Director's Transmittal Letter 26/66, which, in discussing the regulation, adds that "all existing law books and references in inmate law libraries not consistent with this section are to be removed and destroyed." By informal stipulation of the parties, this directive of the Transmittal Letter has not been enforced during the pendency of this action.

[3]D2602 reads as follows: "One inmate may assist another inmate in the preparation of legal documents, but may not receive remuneration therefor. Remuneration is not limited to present benefits, but includes future as well as past benefits. A room or rooms may be designated by the Warden or Superintendent for this purpose. All briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain."

[4]The sets available from the State Law Library for circulation to prison inmates are the California Appellate Reports (1st and 2d); California Reports (1st and 2d); California Reporter; Pacific Reporter (1st and 2d); Federal Reporter (1st and 2d); Federal Rules Decisions; Federal Supplement; United States Reports; Supreme Court Reporter; U.S. Supreme Court Reports, Lawyers' Edition (1st and 2d); California Codes (pamphlet editions only); and California Statutes and Amendments to the Codes.

The apparent completeness of the above list is illusory in view of the facts alluded to above, i.e., that there is only one copy of each of the above sets available for circulation to all California prisoners (of which there are some 30,000), and that a great many volumes have been lost or stolen and have not been replaced. Ninety-three volumes of the United States Reports, for

The arguments put forward by each side are simply summarized. Plaintiffs allege that the above rules and regulations, taken individually, are arbitrary and unreasonable, and that taken collectively they deny indigent prisoners, and their jailhouse lawyers, the legal expertise which is necessary if access to the courts by these persons is to be in any way meaningful. Defendants answer with a citation to certain dicta in *Hatfield v. Bailleaux,* 290 F.2d 632 (1961), a decision by a three-judge court of this Circuit. While affirming the right of the incarcerated not to be unreasonably hindered in making use of the courts, *Hatfield* added that "[s]tate authorities have no obligation . . . .to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform". *Id.* at 640.[5] Defendants conclude from this that the provision of law books in prison libraries is a matter of governmental grace,

---

example, are quite unavailable to any inmate borrower. The borrower's ability to seek out parallel citations in other volumes is hindered, to say the least, by the lack of any lists of parallel citations in either the prisons or on the State Law Library Prison List.

[5] *Hatfield* passed upon the constitutional acceptability of certain Oregon prison regulations which were, for the most part, "time, place and manner" restrictions on access to legal materials, rather than restrictions on the *kinds* of legal materials available to indigents. The regulations in *Hatfield* barred access to law books for prisoners in temporary isolation, and limited the free time which prisoners could spend on legal research. The Court noted that periods of isolation in no case before it exceeded 27 days, and found the other rules reasonable in light of the prisons' interest in barring the practice of jailhouse law. The latter consideration is, of course, no longer cognizable under *Johnson v. Avery, supra* note 1.

i.e. a privilege to be withheld or conditioned as the State chooses. Alternatively, the Attorney General argues that the regulations here under attack are defensible in light of certain legitimate state interests. He cites the need for "economy and standardization" as justifying the restricted prison book lists. The rule barring retention by jailhouse lawyers of papers pertaining to the affairs of others is justified by the need to deny such "lawyers" the tools by which they might coerce payment for their services. Finally, the procedures of the State Library are said to be aimed at problems of loss and mutilation occasioned by inmate borrowers.

The dual thrust of defendants' argument is an implicit recognition that labelling prison libraries a "privilege" and not a "right" will not forestall judicial inquiry into the conditions upon which the "privilege" is granted or withheld. See the oft-cited article by Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L.R. 1439 (1968). The prisoner is no longer regarded as a temporay "slave of the State" [*Ruffin v. Commonwealth*, 62 Va. 790 (1871)], and prison officials are not now such masters of their own domain as to be free of the restraints of constitutional reasonability. *Coffin v. Reichard*, 143 F.2d 443 (1944); *Jackson v. Godwin*, 400 F.2d 529 (1960). The Courts have used various linguistic formulae to describe the limits to prison rule-making authority, sometimes speaking of constitutional rights which are so pre-eminent that they cannot be alienated no matter what the needs of

penal administration might be, and at other times voiding regulations which confer or withhold "privileges" so arbitrarily as to constitute unequal protection of the laws to certain classes of prisoners. *Pierce v. LaVallee*, 293 F.2d 233 (1961); *Jackson v. Godwin, cit. supra.* In most cases, however, the basic test remains the same: the asserted interest of the State in enforcing its rule is balanced against the claimed right of the prisoner and the degree to which it has been infringed by the challenged rule. Most prison regulations reflect the clear exigencies of a penal situation and the courts are justifiably reluctant to question their wisdom. *Austin v. Harris*, 226 F.Supp. 304 (1964). Other rules, though, touch upon interests of which the judiciary is more solicitous, and the burden of justifying these regulations is especially heavy, comparable to the "overwhelming state interest" required by *Shapiro v. Thompson*, 394 U.S. 618 (1969).[8]

---

[8]Thus, the right of a prisoner not to be subjected to racial discrimination is so paramount that it will prevail over even a strong showing that racial segregation of inmates tends to lessen intramural strife and disciplinary problems. Also most closely scrutinized will be charges of religious persecution. *Pierce v. LaVallee and Jackson v. Godwin, cit. supra.*

Statements of the general rule differ in their tone, but nonetheless make it clear that prison rules must pass the basic test of due process reasonability, with that test being more or less stringent according to the character of the right taken from the prisoner. Thus: "The general rule is that under ordinary circumstances prison authorities have a large discretion as to matters of prison administration and that a federal court will not grant relief to a state prisoner complaining against his warden because of the latter's discretionary orders. There are exceptional cases as when a substantive right is involved." *Nolan v. Scafati*, 38 U.S.L.W. 2340 (1969). Also: "[C]onviction and incarceration deprive [one] only of such liberties as the law has ordained he shall suffer for his transgressions. . . . A prisoner retains all the

The rights invoked by plaintiffs herein have been given considerable emphasis by past and present case law. Reasonable access to the courts is a constitutional imperative which has been held to prevail against a variety of state interests.[7] Similarly, the right under the equal protection clause of the indigent and uneducated prisoner to the tools necessary to receive adequate hearing in the courts has received special reenforcement by the federal courts in recent decades. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Richards v. Townsend*, 303 F. Supp. 793 (1969).

Plaintiffs argue, then, that at stake here are two principles of recognized importance, i.e. their rights to reasonable access to the courts, and to equal protection of the laws. But the simple invocation of these phrases will not carry the day for plaintiffs, for they must further show that these rights are not only affected by the regulations under attack, but are infringed to such a degree as to render the justifications offered by the State inadequate and unreason-

---

rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law . . . the acts of which appellant complains . . . were not necessary for the proper punishment of an insubordinate inmate to secure his submission and obedience to its reasonable rules and regulations." *Coffin v. Reichard, cit. supra* at pp. 444-45.

[7]One of the earliest enunciations of the rule was in *Ex parte Hull*, 312 U.S. 546 (1941), which, though admitting the legitimacy of official desires to ensure that inmate petitions were "properly drawn", nonetheless voided a prison regulation which required all habeas petitions to be reviewed by prison authorities before being filed.

able as a matter of law. Here, the State alleges that the infringement is minimal, and that its interests are great, and this claim must now be weighed by the Court.

The basic codes and references authorized for prison use under Prison Regulation 300.041 would offer meager fare to a criminal lawyer. There are no annotated codes, no United States Reports, no federal reports, no California Reports. There are unannotated versions of four of California's codes, but there is no copy of any part of the United States Code. There are copies of the rules of the California and certain federal courts, but there is no edition of the Rules of the Federal District Courts which receive a great many of the habeas corpus petitions, and all of the civil rights petitions, filed by California prisoners. There is one copy of Witkin's treatise on California criminal procedure, but there are no other law books or journals, such as "U.S. Law Week", on the list.

The State answers that the needs of a criminal lawyer are not comparable to those of an inmate, since no legal expertise is required of a prisoner asking for judicial relief. All the convicted felon need do is file a brief statement of the facts of his case. If these facts state a colorable ground for relief, an attorney will be appointed to argue the case. There is no need, it is claimed, for legal arguments or citations in a collateral attack upon a judgment of conviction. See 28 U.S.C. §2242, and Sokol, *Federal Habeas Corpus*, pp. 92-94 (1969) (Second Edition).

The wording of the statute and the wishes of the scholars notwithstanding, this Court takes notice that more than simple "facts" are needed in order to file an adequate petition for relief by way of habeas corpus. A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing. When the Return is filed, it is never without abundant citations to legal authority, and a proper traverse must take cognizance of these points. No attorney filing a habeas petition omits a statement of points and authorities, and neither does the State's attorney in responding to one. *Johnson v. Avery, supra* note 1, has explicitly recognized the relevance of legal expertise to the filing of petitions in habeas corpus. "For all practical purposes, if [illiterate and poorly educated] prisoners cannot have the assistance of a 'jail-house lawyer', their possibly valid constitutional claims will never be heard in any court." *Id.* at 487, citing the lower court decision at 252 F.Supp. 783, 784 (1966). The initial burden of persuading a judge that an evidentiary hearing is necessary lies with the prisoner; given the hundreds of petitions with which the courts are flooded, this burden is a heavy one which only "a few old hands or exceptionally gifted prisoners" can carry. *Id.* at 488.

"Access to the courts", then, is a larger concept than that put forward by the State. It encompasses all the means a defendant or petitioner might require to

get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him. In some contexts this has been interpreted to require court-appointed counsel for indigents. *Gideon v. Wainwright* and *Douglas v. California, cit. supra.* In other situations, the State might be obligated to provide free transcripts, process-serving facilities, and *in forma pauperis* filing privileges. Indigents asking for habeas corpus relief are not invariably entitled to court-appointed counsel [*Eskridge v. Rhay,* 345 F.2d 778 (1965)], but *Johnson v. Avery, supra,* note 1, makes it clear that some provision must be made to ensure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the courts.

The alternatives open to the State are legion It might authorize Public Defenders to help inmates in collateral proceedings. Or it could institute programs whereby law students and professors could aid the indigent convict.[8] The solution thus-far chosen by California is patch-work: the affluent are guaranteed the right to communicate with private counsel [Calif. Pen. Cde. §2600(2)], and to buy personal law books without restriction to save as to space limitations.[9] The indigent, however, are relegated to seeking out fellow inmates with legal knowledge and to the resources of the prison law library, the contents of which are severely limited under the regulation now

[8]For further suggestions, see Larsen, Spector, and Krause, *Prison Writ-Writing: Three Essays,* 56 Calif. L. Rev. 342 (1968).

[9]See note 1, *supra.*

under attack. The prison libraries are to some extent backed up by the State Law Library. However, that institution has itself composed a restricted list, also under challenge here, which shares the weaknesses of the Department of Corrections list described above in that many works are not on the list, and even the books listed are apt to be missing.

Thus, while recent reforms have immeasurably aided the more affluent of California's prisoners in securing access to legal advice and the courts, the lot of the indigent inmate has been somewhat neglected. This neglect of one class, when contrasted with the attention paid to the rights of others, raises serious equal protection questions. Further, for the reasons above stated, plaintiffs' very clearly defined right to reasonable access to the courts is seriously infringed by the highly restricted nature of the book list set forth in Prison Regulation 300.041, even if that list is theoretically supplemented by the State Law Library.

The countervailing considerations offered by the State do not provide sufficient justification for the regulation. The Attorney General has cited the need for economy and standardization in the prisons, but such asserted interests were considered and found insufficient in nearly all the indigent rights cases cited above. In truth, the governmental interests advanced by the defendants in those cases seem much stronger than the considerations advanced by the Attorney General here. The admittedly substantial disciplinary problems of newly integrated prisons

were held to be no justification for continuing segregation in other prisons. The fact that a religion allegedly preached race hatred did not make right official attempts to bar adherents of that religion from holding chapel services in prison. *Jackson v. Godwin,* and *Pierce v. LaVallee, cit. supra; Lee v. Washington,* 390 U.S. 333 (1968); *Fulwood v. Clemmer,* 206 F. Supp. 370 (1962). Judge Blackmun, when offered similar justifications for the use of the strap in Arkansas prisons answered simply and effectively that "[w]e are not convinced . . . by any suggestion that the State needs this tool for disciplinary purposes and is too poor to provide other accepted means of prisoner regulation. Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations or by the thickness of the prisoner's clothing." *Jackson v. Bishop,* 404 F.2d 571, 580 (1968).[10] Just as the harshness of Arkansas prison whips was not deemed mitigated by the provision that all prisoners be clothed when punished, neither is the fundamental inade-

[10] *Johnson v. Avery, supra* note 1 at p. 488, offers another example of a judicial balancing of "indisputable" State interests against clear inmate rights, and a finding that the latter must prevail:

"It is indisputable that prison "writ-writers" like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them. But, as this Court held in *Ex parte Hull* [*supra* note 7], in declaring invalid a state prison regulation which required that prisoners' legal pleadings be screened by state officials:

"'The considerations that prompted [the regulations'] formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.'"

quacy of the restricted book list here relieved by the fact that California authorities have succeeded in "standardizing" the law libraries in all of that State's institutions.

The relief to be fashioned by the Court in the instant case presents some problem. On the one hand, a court of equity is traditionally given great discretion in such matters; on the other, judges have always feared to rush in where correctional officials are presumed more fit to tread. Balancing both these considerations, the Court will enjoin the enforcement of Prison Regulation 330.041, but it will not itself undertake the task of devising another system whereby indigent prisoners are given adequate means of obtaining the legal expertise necessary to obtain judicial consideration of alleged grievances cognizable by the courts. The Department of Corrections will, therefore, decide whether to expand the present list of basic codes and references in the manner suggested by this opinion, or whether to adopt some new method of satisfying the legal needs of its charges.

The court is also asked to enjoin the enforcement restrictions by the State Law Library on prisoner use of its collections. This we will decline to do. Assuming that the Department provides adequately for inmate legal needs, the back-stopping function now performed by the State Library will become superfluous, and the Library's need to cope with the real problems posed by serving a prison population would constitute sufficient justification for the rules which are here attacked.

There remains for this Court's consideration only Director's Rule 2602, which provides that "[O]ne inmate may assist another inmate in the preparation of legal documents, but . . . all briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain." Plaintiffs allege that this rule prevents meaningful mutual assistance, in that it requires in effect that all writing take place in mess halls, where such is impossible, or in libraries, where access is limited and talking is banned. The Court notes, however, that the rule can be easily interpreted to bar only storage of completed legal papers in the cells of persons to whom they do not pertain. Thus, the "jailhouse lawyer" could compose such documents in his own cell, but once they are completed he must deliver them to the possession of the "client", without any threats to retain them until payment is forthcoming. Assuming such an interpretation of Director's Rule 2602, the Court finds it constitutionally valid.

Accordingly It Is Hereby Ordered that Defendants be and are enjoined from enforcing Prison Regulation 330.041. Defendants are further Ordered, on or before September 1, to file with this Court new or amended regulations which accord with the principles expressed herein. If plaintiffs desire oral argument on the adequacy of such new or amended regulations, they will properly move for a hearing thereon. Otherwise, the Court will entertain written briefs concerning the proposed regulations, and will make such further decision as it deems appropriate. In the

interim, no law books, codes, or references now in prison libraries will be destroyed or removed because they are not on the basic reference list promulgated by Prison Regulation 300.041.

It Is So Ordered.
Dated: May 26, 1970.

Ben C. Duniway
United States Circuit Judge

Alfonso J. Zirpoli
United States District Judge

Albert C. Wollenberg
United States District Judge

Original filed May 28, 1970
Clerk, U.S. Dist. Court
San Francisco

United States District Court
Northern District of California

No. 45878

Robert O. Gilmore, Jr.,
John Van Geldern, et al., Plaintiffs,

vs.

Thomas C. Lynch, Attorney General
of California, et al., Defendants.

ORDER

Good cause appearing therefor, It Is Hereby Ordered that upon the timely filing by defendants of a Jurisdictional Statement in the Supreme Court, the order of this Court, dated May 26, 1970, be stayed, insofar as it orders defendants, on or before September 1, 1970, to file with this Court new or amended regulations relating to the subject matter of the action.

It Is Further Ordered that defendants shall submit such proposed regulations within 45 days following any order of the Supreme Court dismissing their appeal or affirming the judgment.

Dated: Aug. 11, 1970

Ben C. Duniway
United States Circuit Judge
Alfonso J. Zirpoli
United States District Judge
Albert C. Wollenberg
United States District Judge

Original Filed
Aug. 14, 1970
Clerk, U.S. Dist. Court
San Francisco

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 22 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM 1970

70-9

No. 582

THOMAS C. LYNCH, et al., *Appellants*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General,
ROBERT R. GRANUCCI,
Deputy Attorney General,
GEORGE R. NOCK,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-3335,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Opinion below	1
Jurisdiction	2
Regulations involved	4
Question presented	5
Statement of the case	5
The question is substantial	6
State prisons have no constitutional obligation to provide inmates with either extensive law libraries or professional or quasi-professional legal assistance	6
1. The decision below conflicts with every federal and state decision on the subject	6
2. Neither the equal protection clause nor the right of prison inmates to reasonable access to the courts compels prison administrators to furnish inmates with extensive law libraries or alternative legal assistance	8
Conclusion	14

Table of Authorities Cited

Cases	Pages
Austin v. Harris, 226 F. Supp. 304 (W.D. Mo. 1964)	7
Barber v. Page, 239 F. Supp. 265 (E.D. Okla. 1965), rev'd on other grounds, 390 U.S. 719 (1968)	7
Bolden v. Pegelow, 218 F. Supp. 152 (E.D. Va. 1963)	7
Coonts v. Wainwright, 282 F. Supp. 893 (N.D. Fla. 1968)	6
Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960)	3
Gilmore v. Lynch, 400 F.2d 228, cert. denied, 393 U.S. 1092 (1969)	3
Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), cert. denied, 368 U.S. 862 (1961)	6, 9
Hooker v. United States District Court, Central District of California, 380 F.2d 5 (9th Cir. 1967)	11
In re Allison, 66 Cal.2d 282, 425 P.2d 193, 57 Cal.Rptr. 593 (1967)	7
In re Harrell, 2 Cal.3d 675, ... P.2d ....., ... Cal.Rptr. ..... (1970)	7
In re Schoengarth, 66 Cal.2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967)	7
Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966), rev'd on other grounds, 382 F.2d 353 (6th Cir. 1967), judgment of Court of Appeals rev'd on other grounds, 393 U.S. 483 (1969)	6, 7, 9, 11, 14
Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965)	7
Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966)	6
U.S. ex rel. Mayberry v. Prasse, 225 F. Supp. 752 (E.D. Pa. 1963)	7
U.S. ex rel. Stuart v. Yeager, 293 F. Supp. 1079 (D. N.J. 1968)	6

Pages

U.S. ex rel. Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965) 7

United States v. Georgia Public Social Services Comm'n, 371 U.S. 285 (1963) 3

Statutes

Title 28, United States Code:

Section 1253 3
Section 1292(b) 2
Section 1343(3) 2
Section 1343(4) 2
Section 2101(b) 3
Section 2201 2
Section 2281 2
Section 2284 2

Title 42, United States Code:

Section 1983 2

Constitutions

United States Constitution:

Fourteenth Amendment 2

Texts

California Department of Corrections Administrative Manual, paragraphs 330.041 and 330.042 ..... 2, 4

In the Supreme Court

OF THE

United States

OCTOBER TERM 1970

No.

THOMAS C. LYNCH, et al.,
Appellants,

vs.

ROBERT O. GILMORE, JR., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment and order of the specially constituted United States District Court for the Northern District of California. Appellants submit this statement to demonstrate that this Court has jurisdiction of the appeal and that substantial constitutional questions are presented.

OPINION BELOW

The Opinion of the United States District Court for the Northern District of California is unreported. A copy of the opinion granting the injunction is attached hereto as Appendix A.

JURISDICTION

This suit was brought on behalf of appellees and all other indigent inmates of California correctional institutions for injunctive and declaratory relief under the authority of Title 42, United States Code, section 1983 and Title 28, United States Code, sections 1343(3) and (4), 2201 and 2281 to declare, inter alia, that California Department of Corrections Administrative Manual, Paragraphs 330.041 and 330.042 are in violation of the United States Constitution and to enjoin appellants from enforcing said regulations against appellees and the class they represent on the ground that the regulations violate their rights under the Fourteenth Amendment to the United States Constitution.

The order of the court below granting an injunction against enforcement of the regulations was entered on May 28, 1970. Notice of appeal to this Court was filed in the United States District Court for the Northern District of California on June 25, 1970. A copy of the Notice of Appeal is attached hereto as Appendix B.

The action was originally heard before a single judge of the District Court. Plaintiffs (appellees herein) moved for the convening of a three-judge district court pursuant to Title 28, United States Code, sections 2281 and 2284. The motion was denied, by amended order filed July 6, 1967, on the ground that the complaint did not raise substantial questions of federal law. Pursuant to Title 28, United States Code, section 1292(b), a special appeal was taken to the

Court of Appeals for the Ninth Circuit, the sole issue being whether one or more issues raised by the complaint were required to be heard and determined by a court of three judges. In an opinion filed August 16, 1968, the Court of Appeals answered that question in the affirmative, reversing the order of the District Court. The opinion of the Court of Appeals is reported as *Gilmore v. Lynch*, 400 F.2d 228. This Court denied certiorari. 393 U.S. 1092 (1969). The original order of the District Court denying the motion to convene a three-judge district court is printed as Exhibit B to the above petition for certiorari (No. 626, O.T. 1968), as is the opinion of the Court of Appeals.

The question of the necessity that the issues be heard and determined by a three-judge district court has thus been heretofore litigated. The jurisdiction of the three-judge court having been established, the jurisdiction of the Supreme Court to review the decision of the District Court by direct appeal is conferred by Title 28, United States Code, sections 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal: *United States v. Georgia Public Social Services Comm'n*, 371 U.S. 285, 287 (1963); *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 75-76 (1960).

REGULATIONS INVOLVED

California Department of Corrections Administrative Manual Paragraphs 330.041 and 330.042 provide:

330.041

There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

1. The California Penal Code
2. The California Welfare and Institutions Code
3. The California Health and Safety Code
4. The California Vehicle Code
5. The United States and California Constitutions
6. A recognized law dictionary (such as Black's)
7. Witkin's California Criminal Procedures (Bender Moss Co.)
8. Subscription to California Weekly Digest
9. California Rules of Court
10. Rules of United States Court of Appeals (Ninth Circuit)
11. *Rules of United States Supreme Court*

330.042

Sufficient copies will be maintained to provide reasonable access on not less than a weekly basis.

QUESTION PRESENTED

Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to provide inmates with professional or quasi-professional legal assistance?

STATEMENT OF THE CASE

Appellees, indigent inmates of California correctional institutions, brought a class action on behalf of themselves and all other indigent inmates. There were numerous claims for relief raised in the complaint, but the only one relevant to the instant appeal was the claim of unconstitutionality of new regulations establishing uniform law libraries for each institution. The effect of establishing a standardized list of lawbooks for each institution would have been to establish law libraries in some institutions, expand existing libraries in others, and contract existing libraries in two other institutions through removal of books not on the list.[1] It was the threatened removal of existing lawbooks from two institutions which was asserted to be unconstitutional.

The District Court held that the regulations complained of violated prisoners' rights to reasonable access to the courts and equal protection of the laws. An injunction against enforcement of the regulations was issued, and defendants were ordered to draft and

---

[1]The regulations in question have never been fully implemented, in that no books have been removed from prison law libraries pending final disposition of the lawsuit.

submit for the court's approval by September 1, 1970,[2] new regulations either greatly expanding the contents of prison law libraries or providing for the assistance to inmates of attorneys or law students."

THE QUESTION IS SUBSTANTIAL

STATE PRISONS HAVE NO CONSTITUTIONAL OBLIGATION TO PROVIDE INMATES WITH EITHER EXTENSIVE LAW LIBRARIES OR PROFESSIONAL OR QUASI-PROFESSIONAL LEGAL ASSISTANCE

1. The Decision Below Conflicts with Every Federal and State Decision on the Subject.

The District Court held that state prison officials are under an affirmative constitutional duty to provide inmates in their charge with either extensive law library facilities or the professional assistance of attorneys or law students. This holding conflicts directly with every other federal and state decision on the subject, each of which has held that prison officials have no duty to furnish inmates with any lawbooks or legal materials whatever. These cases are: *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); *U.S. ex rel. Stuart v. Yeager*, 293 F. Supp. 1079 (D.N.J. 1968); *Coonts v. Wainwright*, 282 F. Supp. 893 (N.D. Fla. 1968); *Roberts v. Pepersack*, 256 F. Supp. 415, 433-34 (D. Md. 1966); *Johnson v. Avery*, 252 F. Supp. 783, 787 (M.D. Tenn.

---

[2]By order of the District Court filed August 14, 1970, the original order, insofar as it required defendants to submit new regulations, was stayed, upon the timely filing of the instant Jurisdictional Statement, until 45 days following any order of this Court dismissing the instant appeal or affirming the judgment.

1966), *rev'd on other grounds,* 382 F.2d 353 (6th Cir. 1967), *judgment of the Court of Appeals rev'd on other grounds,* 393 U.S. 483 (1969); *U.S. ex rel. Wakeley v. Pennsylvania,* 247 F. Supp. 7 (E.D. Pa. 1965); *Barber v. Page,* 239 F. Supp. 265 (E.D. Okla. 1965), *rev'd on other grounds,* 390 U.S. 719 (1968); *Bolden v. Pegelow,* 218 F. Supp. 152, 154 (E.D. Va. 1963) (dealing with inmates of federal institution); *In re Allison,* 66 Cal.2d 282, 290, 425 P.2d 193, 57 Cal. Rptr. 593 (1967); *In re Schoengarth,* 66 Cal.2d 295, 305, 425 P.2d 200, 57 Cal.Rptr. 600 (1967).[3] *See also Lee v. Tahash,* 352 F.2d 970, 973-74 (8th Cir. 1965); *Austin v. Harris,* 226 F. Supp. 304, 307 (W.D. Mo. 1964). *Cf. U.S. ex rel. Mayberry v. Prasse,* 225 F. Supp. 752 (E.D. Pa. 1963).

The decision of the District Court thus conflicts fundamentally with a decision of the Court of Appeals for the Ninth Circuit (in which the court below is located) and with decisions of district courts in the Third, Fourth, Fifth, Sixth, and Tenth Circuits. It may not be reconciled with principles set forth in decisions of the Court of Appeals for the Eighth Circuit and a district court within that Circuit. And it directly conflicts with decisions of the California Supreme Court. The very existence of such a patent conflict itself demands decision by this Court and demonstrates that the question presented is indeed substantial. If the decision below is allowed to stand

---

[3]The issue was recently raised again in the California Supreme Court, which declined to rule on the sufficiency of prison law libraries until after the determination of the instant case. *In re Harrell,* 2 Cal.3d 675, 695, ___ P.2d ___, ___ Cal.Rptr. ___ (1970).

without plenary review by this Court, California, alone among American jurisdictions, will be deemed obliged by the federal constitution to furnish inmates with large and expensive law libraries or alternative legal services. No such obligation will be imposed on the prison officials of any other jurisdiction, including the others within the Ninth Circuit. Such an anomaly would be intolerable. The need for uniformity of constitutional interpretation throughout the land demands plenary consideration by this Court of the instant appeal.

2. Neither the Equal Protection Clause Nor the Right of Prison Inmates to Reasonable Access to the Courts Compels Prison Administrators to Furnish Inmates with Extensive Law Libraries or Alternative Legal Assistance.

The ruling of the District Court was based upon the proposition that failure on the part of appellants to provide prison inmates with law libraries containing such items as federal and state case reports and annotated state codes impaired inmates' right of reasonable access to the courts and denied indigent inmates equal protection of the laws vis-a-vis non-indigents. The conclusion that both constitutional rights were denied is based upon the essential proposition that use of extensive law libraries (or, alternatively, the availability of professional or quasi-professional legal services) is necessary to enable an inmate to get a fair hearing on his contentions of denial of federal rights, presented through habeas corpus petitions or Civil Rights Act complaints. Appellants challenge this essential proposition.

"Access to the courts" has been defined (a definition not challenged by the District Court) as:

> "[T]he opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux, supra,* 290 F.2d at 637.

As so defined, "access to the courts" clearly does not embrace access to an extensive law library.

The opinion of the District Court considers and rejects the long-accepted proposition that a habeas corpus petition (or Civil Rights Act complaint) need only set forth the facts upon which the claim for relief is based. Two Justices of this Court have recognized this proposition:

> "Habeas corpus petitions, as the majority notes, are relatively easy to prepare; they need only set out the facts giving rise to a claim for relief and the judge will apply the law, appointing a lawyer for the prisoner and giving him a hearing when appropriate." *Johnson v. Avery,* 393 U.S. 483, 500 (1969) (dissenting opinion of Mr. Justice White, joined by Mr. Justice Black).

The District Court bases its rejection of this proposition in part upon the undoubted fact that lawyers cite legal authority in preparing or responding to petitions for writs of habeas corpus.

> "When the Return is filed, it is never without abundant citations to legal authority, and a proper traverse must take cognizance of these points. No attorney filing a habeas petition omits a statement of points and authorities, and neither does the State's attorney in responding to one." Appendix A, p. ix.

This observation misses the point. The convict filing a habeas corpus petition cannot be, and is not, expected to discuss, or even to understand, the law. The habeas petition, in its early stages, should not be tested in the crucible of an adversary proceeding. Its function should be solely to bring to the attention of the courts the factual claims upon which the convict bases his contention that he is being illegally treated. The attorney for the respondent may, and commonly does, point out authorities tending to show that a given petition does not state grounds for relief. His role in this regard is primarily to assist the court. If the judge concludes that an adversary determination of questions of law or fact is necessary for proper adjudication of the inmate's claim, he will appoint an attorney for him.

Lawbooks are the tools of the lawyer's trade. Written by lawyers for lawyers, they are all but impenetrable to the layman. Case reports, in particular, are beyond the ability of all but a few convicts to use effectively. While it is the policy of California to give inmates access to lawbooks, we suggest that their value has been grossly overestimated by the District Court. Indeed, to the extent to which access to ex-

tensive collections of lawbooks encourages convicts to incorporate in their habeas petitions voluminous, irrelevant and confusing citations, they may even impede judicial consideration of an inmate's factual contentions.

As an additional rationale for its decision, the District Court states that "A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent." This rationale does not withstand analysis. The complete record in the instant case includes copies of habeas corpus forms for federal and state courts which are available free of charge to all California state prisoners. Copies of the same forms were lodged with this Court by the People of the State of California in connection with their amicus curiae brief in the case of *Johnson v. Avery, supra,* O.T. 1968, No. 40, and, absent special request, we will not burden the files of this Court by lodging duplicates in connection with the instant appeal. These forms consist of detailed questionnaires designed to elicit from the petitioner the basic facts needed to determine the merits of his claim, including the question of whether he has exhausted state remedies. Because of the comprehensiveness of these forms, federal district courts, at least in the Ninth Circuit, have been given discretion to disregard legal arguments not appearing on the forms. *Hooker v. United States District Court, Central District of California,* 380 F.2d 5 (9th Cir. 1967). While the forms do not expressly instruct the petitioner as to the District in which he should file his

petition, or that the warden or superintendent of the institution in which he is confined should technically be named as respondent, it has been our experience (and one not challenged by the District Court) that prisoners have little difficulty ascertaining these facts.

Moreover, the possibility that the lawbooks provided inmates under the regulation in question may not fully apprise them of the rules of jurisdiction, venue and proper parties respondent cannot justify the action taken by the District Court. These rules could be easily supplied to inmates by simply adding to the list of prison lawbooks a copy of Title 28 of the United States Code, in unannotated form, and a copy of the Federal Rules of Civil Procedure (for Civil Rights Act complaints). Yet the District Court has not indicated that it would accept such a simple augmentation of the law library lists. Instead, the District Court appears to have ruled that appellants must provide numerous complete sets of case reports, which have little or no value in apprising inmates of the "rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent."

But if it be assumed that some lawbooks are necessary to preserve a prison inmate's right of reasonable access to the courts, we submit that the lawbooks furnished under the regulation at issue are more than adequate to the task. Under the existing regulations, prisoners are given weekly access to a library containing the wording of the statutes under which they were convicted, considerable procedural information, a

most helpful and well-recognized textbook (WITKIN, CRIMINAL PROCEDURE), which, with pocket parts and supplements, summarizes the law of greatest interest to California prisoners, and a periodical (the *Weekly Law Digest*, designated in the regulation as the California Weekly Digest) which informs them of significant recent cases which may be relevant to the facts of each individual's case. These publications are much more easily understood by laymen than are case reports, and thus much more helpful to inmates in selecting which facts of their cases to present to the courts.

In sum, bearing in mind that a proper habeas corpus or Civil Rights Act complaint need merely contain a clear and concise statement of the facts upon which a claim for relief is based, lawbooks may be a hindrance and are rarely a help to inmates seeking judicial relief. In no event may they be accurately characterized as necessary to enable an inmate to gain access to the courts.

The equal protection theory employed by the District Court is based upon the premise that lawbooks are necessary to equalize the positions of the indigent and the affluent inmate, the former allegedly being disadvantaged vis-a-vis the latter, who is able to retain counsel. This theory proceeds upon the same unsound assumption—that extensive law library facilities are necessary to enable a convict to secure access to the courts. The equal protection claim is thus a variant of the "reasonable access to the courts" argument, and

falls because of the same infirmity in its basic premise.

The same principles supporting the conclusion that use of extensive law library facilities are not needed to vindicate convicts' rights either to equal protection or to reasonable access to the courts, demonstrate that the services of lawyers or law students are likewise unnecessary for the same purpose. The requirements for placing inmates' claims before the courts are so simple and easily met—particularly in light of the availability of prison writ-writers under the decision of this Court in *Johnson v. Avery, supra*—that no professional assistance in the preparation of habeas corpus petitions and Civil Rights Act complaints is required. The availability of appointed counsel when a facially meritorious petition is filed fully protects convicts' right to their day in court.

CONCLUSION

The District Court has ruled that state prison officials are obliged under the federal constitution to furnish inmates not merely with food, shelter, and clothing, but with extensive law libraries as well. Lawbooks have thus been equated with the necessities of life. The decision is not only contrary to every authority; it is fundamentally unsound. It is also pernicious, in that it will oblige prison administrations to expend their limited funds uselessly on lawbooks at the expense of far more desirable rehabilitative projects.

For the reasons stated above, a substantial question under the Constitution is presented in this case. Jurisdiction should be noted.

August 24, 1970.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General,
ROBERT R. GRANUCCI,
Deputy Attorney General,
GEORGE R. NOCK,
Deputy Attorney General,
Attorneys for Appellants.

(Appendices A and B Follow)

Appendix A

In the United States District Court for the Northern District of California

Case No. 45878*

Robert O. Gilmore, Jr., John Van Geldern, et al.,
Plaintiffs,

vs.

Thomas C. Lynch, Attorney General of California, et al.,
Defendants.

ORDER GRANTING RELIEF

Before: DUNIWAY, U. S. Circuit Judge, and ZIRPOLI and WOLLENBERG, U.S. District Judges.

Plaintiffs herein are prisoners at various facilities administered by the California Department of Corrections. They challenge certain rules and regulations of the Department concerning inmate access to law books, legal materials, and lay assistance in preparing prisoner writs and complaints. Also attacked are pro-

*This case has been consolidated with the following cases: 46297, 46298, 46299, 47015, 47111, 45749, 48232, 48351, 48352, 48353, 48354, 48355, 48361, 48362, 48607, 48858, 48974, 49073, 49090, 49856, 49942, 49943, 50024, 50775, and 50855.

cedures of the California State Law Library regarding circulation of legal materials to prisoners. Since plaintiffs ask that the enforcement of these rules be enjoined on constitutional grounds, and since the rules are of state-wide applicability, a three judge court was mandated by the Court of Appeals for this Circuit. *Gilmore v. Lynch,* 400 F.2d 228 (1968); cert. den. *Lynch v. Gilmore,* 393 U.S. 1092 (1968); 28 U.S.C. § 2281; *Okla. Gas Co. v. Russell,* 261 U.S. 290 (1923); *Ala. Comm. v. Sthn. Ry. Co.,* 341 U.S. 341, 343 (footnote #3) (1951).

Some of the prison rules originally brought into question by plaintiffs have since been suppressed or amended in response to changed institutional situations and in light of recent court decisions.[1] Others remain, however, and their constitutionality is now before the Court. More specifically, the Court is asked to pass on Prison Regulation 330.041, which establishes an exclusive list of "basic codes and references" for prison use,[2] and Director's Rule 2602, which,

---

[1]Most noteworthy among these decisions is *Johnson v. Avery,* 393 U.S. 483 (1969).

Prisoners who are financially capable of doing so may now purchase law books and other materials for their personal use. Transmittal Letter No. 5/69, dated May 9, 1969, and signed by R. K. Procuper, Director of Corrections. Similarly, more articulate and better educated inmates may assist others in the preparation of legal papers. Director's Rule D2602, as modified.

[2]The Department of Corrections Administrative Manual sets forth the text of Regulation 330.041 as follows:

> "There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:
>
> (1) The California Penal Code
> (2) The California Welfare and Institutions Code
> (3) The California Health and Safety Code

among other provisions, requires that all legal papers remain in the possession of the inmate to whom they pertain.[3] The State Library procedures herein questioned also set up a restricted list of law books available for prison circulations. Evidently, only one copy of each of the listed works is set aside for inmate borrowers, and even a great many of these have been lost or stolen over the years.[4]

---

(4) The California Vehicle Code
(5) The United States and California Constitutions
(6) A recognized law dictionary (such as Black's)
(7) Witkin's California Criminal Procedures (Bender Moss Co.)
(8) Subscription to California Weekly Digest
(9) California Rules of Court
(10) Rules of United States Court of Appeals (Ninth Circuit)
(11) Rules of United States Supreme Court."

The above regulation is to be read in conjunction with the Director's Transmittal Letter 26/66, which, in discussing the regulation, adds that "all existing law books and references in inmate law libraries not consistent with this section are to be removed and destroyed." By informal stipulation of the parties, this directive of the Transmittal Letter has not been enforced during the pendency of this action.

[3]D2602 reads as follows:

"One inmate may assist another inmate in the preparation of legal documents, but may not receive remuneration therefor. Remuneration is not limited to present benefits, but includes future as well as past benefits. A room or rooms may be designated by the Warden or Superintendent for this purpose. All briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain."

[4]The sets available from the State Law Library for circulation to prison inmates are the California Appellate Reports (1st and 2d); California Reports (1st and 2d); California Reporter; Pacific Reporter (1st and 2d); Federal Reporter (1st and 2d); Federal Rules Decisions; Federal Supplement; United States Reports; Supreme Court Reporter; U.S. Supreme Court Reports, Lawyers' Edition (1st and 2d); California Codes (pamphlet editions only); and California Statutes and Amendments to the Codes.

The apparent completeness of the above list is illusory in view of the facts alluded to above, i.e., that there is only one copy of

The arguments put forward by each side are simply summarized. Plaintiffs allege that the above rules and regulations, taken individually, are arbitrary and unreasonable, and that taken collectively they deny indigent prisoners, and their jailhouse lawyers, the legal expertise which is necessary if access to the courts by these persons is to be in any way meaningful. Defendants answer with a citation to certain dicta in *Hatfield v. Bailleaux*, 290 F.2d 632 (1961), a decision by a three-judge court of this Circuit. While affirming the right of the incarcerated not to be unreasonably hindered in making use of the courts, *Hatfield* added that "[s]tate authorities have no obligation . . . to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform". *Id.* at 640.[5] Defendants

---

each of the above sets available for circulation to all California prisoners (of which there are some 30,000), and that a great many volumes have been lost or stolen and have not been replaced. Ninety-three volumes of the United States Reports, for example, are quite unavailable to any inmate borrower. The borrower's ability to seek out parallel citations in other volumes is hindered, to say the least; by the lack of any lists of parallel citations in either the prisons or on the State Law Library Prison List.

[5]Hatfield passed upon the constitutional acceptability of certain Oregon prison regulations which were, for the most part, "time, place and manner" restrictions on access to legal materials, rather than restrictions on the *kinds* of legal materials available to indigents. The regulations in *Hatfield* barred access to law books for prisoners in temporary isolation, and limited the free time which prisoners could spend on legal research. The Court noted that periods of isolation in no case before it exceeded 27 days, and found the other rules reasonable in light of the prisons' interest in barring the practice of jailhouse law. The latter consideration is, of course, no longer cognizable under *Johnson v. Avery, supra* note 1.

conclude from this that the provision of law books in prison libraries is a matter of governmental grace, i.e., a privilege to be withheld or conditioned as the State chooses. Alternatively, the Attorney General argues that the regulations here under attack are defensible in light of certain legitimate state interests. He cites the need for "economy and standardization" as justifying the restricted prison book lists. The rule barring retention by jailhouse lawyers of papers pertaining to the affairs of others is justified by the need to deny such "lawyers" the tools by which they might coerce payment for their services. Finally, the procedures of the State Library are said to be aimed at problems of loss and mutilation occasioned by inmate borrowers.

The dual thrust of defendants' argument is an implicit recognition that labelling prison libraries a "privilege" and not a "right" will not forestall judicial inquiry into the conditions upon which the "privilege" is granted or withheld. See the oft-cited article by Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L.R. 1439 (1968). The prisoner is no longer regarded as a temporary "slave of the State" [*Ruffin v. Commonwealth*, 62 Va. 790 (1871)], and prison officials are not now such masters of their own domain as to be free of the restraints of constitutional reasonability. *Coffin v. Reichard*, 143 F.2d 443 (1944); *Jackson v. Godwin*, 400 F.2d 529 (1960). The Courts have used various linguistic formulae to describe the limits to prison rule-making authority, sometimes speak-

ing of constitutional rights which are so pre-eminent that they cannot be alienated no matter what the needs of penal administration might be, and at other times avoiding regulations which confer or withhold "privileges" so arbitrarily as to constitute unequal protection of the laws to certain classes of prisoners. *Pierce v. LaVallee,* 293 F.2d 233 (1961); *Jackson v. Godwin, cit. supra.* In most cases, however, the basic test remains the same: the asserted interest of the State in enforcing its rule is balanced against the claimed right of the prisoner and the degree to which it has been infringed by the challenged rule. Most prison regulations reflect the clear exigencies of a penal situation and the courts are justifiably reluctant to question their wisdom. *Austin v. Harris,* 226 F.Supp. 304 (1964). Other rules, though, touch upon interests of which the judiciary is more solicitous, and the burden of justifying these regulations is especially heavy, comparable to the "overwhelming state interest" required by *Shapiro v. Thompson,* 394 U.S. 618 (1969).[6]

---

[6]Thus, the right of a prisoner not to be subjected to racial discrimination is so paramount that it will prevail over even a strong showing that racial segregation of inmates tends to lessen intramural strife and disciplinary problems. Also most closely scrutinized will be charges of religious persecution. *Pierce v. LaVallee,* and *Jackson v. Godwin, cit. supra.*

Statements of the general rule differ in their tone, but nonetheless make it clear that prison rules must pass the basic test of due process reasonability, with that test being more or less stringent according to the character of the right taken from the prisoner. Thus: "The general rule is that under ordinary circumstances prison authorities have a large discretion as to matters of prison administration and that a federal court will not grant relief to a state prisoner complaining against his warden because of the latter's discretionary orders. There are exceptional cases as when a

The rights invoked by plaintiffs herein have been given considerable emphasis by past and present case law. Reasonable access to the courts is a constitutional imperative which has been held to prevail against a variety of state interests.[7] Similarly, the right under the equal protection clause of the indigent and uneducated prisoner to the tools necessary to receive adequate hearing in the courts has received special re-enforcement by the federal courts in recent decades. *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Douglas v. California,* 372 U.S. 353 (1963); *Griffin v. Illinois,* 351 U.S. 12 (1956); *Richards v. Townsend,* 303 F. Supp. 793 (1969).

Plaintiffs argue, then, that at stake here are two principles of recognized importance, i.e. their rights to reasonable access to the courts, and to equal protection of the laws. But the simple invocation of these phrases will not carry the day for plaintiffs, for they must further show that these rights are not only affected by the regulations under attack, but are in-

---

substantive right is involved." *Nolan v. Scafati,* 38 U.S.L.W. 2340 (1969). Also: "[C]onviction and incarceration deprive [one] only of such liberties as the law has ordained he shall suffer for his transgressions . . . . A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law . . . . the acts of which appellant complains . . . were not necessary for the proper punishment of an insubordinate inmate to secure his submission and obedience to its reasonable rules and regulations." *Coffin v. Reichard, cit. supra* at pp. 444-45.

[7]One of the earliest enunciations of the rule was in *Ex parte Hull,* 312 U.S. 546 (1941), which, though admitting the legitimacy of official desires to ensure that inmate petitions were "properly drawn", nonetheless voided a prison regulation which required all habeas petitions to be reviewed by prison authorities before being filed.

fringed to such a degree as to render the justifications offered by the State inadequate and unreasonable as a matter of law. Here, the State alleges that the infringement is minimal, and that its interests are great, and this claim must now be weighed by the Court.

The basic codes and references authorized for prison use under Prison Regulation 300.041 would offer meager fare to a criminal lawyer. There are no annotated codes, no United States Reports, no federal reports, no California Reports. There are unannotated versions of four of California's codes, but there is no copy of any part of the United States Code. There are copies of the rules of the California and certain federal courts, but there is no edition of the Rules of the Federal District Courts which receive a great many of the habeas corpus petitions, and all of the civil rights petitions, filed by California prisoners. There is one copy of Witkin's treatise on California criminal procedure, but there are no other law books or journals, such as "U.S. Law Week", on the list.

The State answers that the needs of a criminal lawyer are not comparable to those of an inmate, since no legal expertise is required of a prisoner asking for judicial relief. All the convicted felon need do is file a brief statement of the facts of his case. If these facts state a colorable ground for relief, an attorney will be appointed to argue the case. There is no need, it is claimed, for legal arguments or citations in a collateral attack upon a judgment of conviction. See 28 U.S.C. §2242, and Sokol, *Federal Habeas Corpus,* pp. 92-94 (1969) (Second Edition).

The wording of the statute and the wishes of the scholars notwithstanding, this Court takes notice that more than simple "facts" are needed in order to file an adequate petition for relief by way of habeas corpus. A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing. When the Return is filed, it is never without abundant citations to legal authority, and a proper traverse must take cognizance of these points. No attorney filing a habeas petition omits a statement of points and authorities, and neither does the State's attorney in responding to one. *Johnson v. Avery, supra* note 1, has explicity recognized the relevance of legal expertise to the filing of petitions in habeas corpus. "For all practical purposes, if [illiterate and poorly educated] prisoners cannot have the assistance of a 'jailhouse lawyer', their possibly valid constitutional claims will never be heard in any court." *Id.* at 487, citing the lower court decision at 252 F.Supp. 783, 784 (1966). The initial burden of persuading a judge that an evidentiary hearing is necessary lies with the prisoner; given the hundreds of petitions with which the courts are flooded, this burden is a heavy one which only "a few old hands or exceptionally gifted prisoners" can carry. *Id.* at 488.

"Access to the courts", then, is a larger concept than that put forward by the State. It encompasses all the means a defendant or petitioner might require to get

a fair hearing from the judiciary on all charges brought against him or grievances alleged by him. In some contexts this has been interpreted to require court-appointed counsel for indigents. *Gideon v. Wainwright* and *Douglas v. California, cit. supra.* In other situations, the State might be obligated to provide free transcripts, process-serving facilities, and *in forma pauperis* filing privileges. Indgients asking for habeas corpus relief are not invariably entitled to court-appointed counsel [*Eskridge v. Rhay,* 345 F.2d 778 (1965)], but *Johnson v. Avery, supra,* note 1, makes it clear that some provision must be made to ensure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the courts.

The alternatives open to the State are legion. It might authorize Public Defenders to help inmates in collateral proceedings. Or it could institute programs whereby law students and professors could aid the indigent convict.[8] The solution thus-far chosen by California is patch-work: the affluent are guaranteed the right to communicate with private counsel [Calif. Pen. Cde. §2600(2)], and to buy personal law books without restriction save as to space limitations.[9] The indigent, however, are relegated to seeking out fellow inmates with legal knowledge, and to the resources of the prison law library, the contents of which are severely limited under the regulation now under at-

---

[8]For further suggestions, see Larsen, Spector, and Krause, *Prison Writ-Writing: Three Essays,* 56 Calif. L. Rev. 342 (1968).

[9]See note 1, *supra.*

tack. The prison libraries are to some extent backed up by the State Law Library. However, that institution has itself composed a restricted list, also under challenge here, which shares the weaknesses of the Department of Corrections list described above in that many works are not on the list, and even the books listed are apt to be missing.

Thus, while recent reforms have immeasurably aided the more affluent of California's prisoners in securing access to legal advice and the courts, the lot of the indigent inmate has been somewhat neglected. This neglect of one class, when contrasted with the attention paid to the rights of others, raises serious equal protection questions. Further, for the reasons above stated, plaintiffs' very clearly defined right to reasonable access to the courts is seriously infringed by the highly restricted nature of the book list set forth in Prison Regulation 300.041, even if that list is theoretically supplemented by the State Law Library.

The countervailing considerations offered by the State do not provide sufficient justification for the regulation. The Attorney General has cited the need for economy and standardization in the prisons, but such asserted interests were considered and found insufficient in nearly all the indigent rights cases cited above. In truth, the governmental interests advanced by the defendants in those cases seem much stronger than the considerations advanced by the Attorney General here. The admittedly substantial disciplinary problems of newly integrated prisons were held to be

no justification for continuing segregation in other prisons. The fact that a religion allegedly preached race hatred did not make right official attempts to bar adherents of that religion from holding chapel services in prison. *Jackson v. Godwin,* and *Pierce v. LaVallee, cit. supra; Lee v. Washington,* 390 U.S. 333 (1968); *Fulwood v. Clemmer,* 206 F.Supp. 370 (1962). Judge Blackmun, when offered similar justifications for the use of the strap in Arkansas prisons answered simply and effectively that "[w]e are not convinced . . . by any suggestion that the State needs this tool for disciplinary purposes and is too poor to provide other accepted means of prisoner regulation. Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations or by the thickness of the prisoner's clothing." *Jackson v. Bishop,* 404 F.2d 571, 580 (1968).[10] Just as the harshness of Arkansas prison whips was not deemed mitigated by the provision that all prisoners be clothed when punished, neither is the

---

[10] *Johnson v. Avery, supra* note 1 at p. 488, offers another example of a judicial balancing of 'indisputable' State interests against clear inmate rights, and a finding that the latter must prevail:

> "It is indisputable that prison 'writ-writers' like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them. But, as this Court held in *Ex parte Hull* [*supra* note 7], in declaring invalid a state prison regulation which required that prisoners' legal pleadings be screened by state officials:
>
> "'The considerations that prompted [the regulations'] formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.'"

fundamental inadequacy of the restricted book list here relieved by the fact that California authorities have succeeded in "standardizing" the law libraries in all of that State's institutions.

The relief to be fashioned by the Court in the instant case presents some problem. On the one hand, a court of equity is traditionally given great discretion in such matters; on the other, judges have always feared to rush in where correctional officials are presumed more fit to tread. Balancing both these considerations, the Court will enjoin the enforcement of Prison Regulation 330.041, but it will not itself undertake the task of devising another system whereby indigent prisoners are given adequate means of obtaining legal expertise necessary to obtain judicial consideration of alleged grievances cognizable by the courts. The Department of Corrections will, therefore, decide whether to expand the present list of basic codes and references in the manner suggested by this opinion, or whether to adopt some new method of satisfying the legal needs of its charges.

The court is also asked to enjoin the enforcement restrictions by the State Law Library on prisoner use of its collections. This we will decline to do. Assuming that the Department provides adequately for inmate legal needs, the back-stopping function now performed by the State Library will become superfluous, and the Library's need to cope with the real problems posed by serving a prison population would constitute sufficient justification for the rules which are here attacked.

There remains for this Court's consideration only Director's Rule 2602, which provides that "[O]ne inmate may assist another inmate in the preparation of legal documents, but . . . all briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain." Plaintiffs allege that this rule prevents meaningful mutual assistance, in that it requires in effect that all writing take place in mess halls, where such is impossible, or in libraries, where access is limited and talking is banned. The Court notes, however, that the rule can be easily interpreted to bar only storage of completed legal papers in the cells of persons to whom they do not pertain. Thus, the "jailhouse lawyer" could compose such documents in his own cell, but once they are completed he must deliver them to the possession of the "client", without any threats to retain them until payment is forthcoming. Assuming such an interpretation of Director's Rule 2602, the Court finds it constitutionally valid.

Accordingly, It Is Hereby Ordered that Defendants be and are enjoined from enforcing Prison Regulation 330.041. Defendants are further Ordered, on or before September 1, to file with this Court new or amended regulations which accord with the principles expressed herein. If plaintiffs desire oral argument on the adequacy of such new or amended regulations, they will properly move for a hearing thereon. Otherwise, the Court will entertain written briefs concerning the proposed regulations, and will make such further decision as it deems appropriate. In the interim, no law

books, codes, or references now in prison libraries will be destroyed or removed because they are not on the basic reference list promulgated by Prison Regulation 300.041.

It Is So Ordered.

Dated: May 26, 1970.

Ben C. Duniway,
United States Circuit Judge,

Alfonso J. Zirpoli,
United States District Judge,

Albert C. Wollenberg,
United States District Judge.

Original Filed May 28, 1970,
Clerk U.S. Dist. Court, San Francisco, Calif.

Appendix B

In the United States District Court
Northern District of California

No. 45,878

Robert O. Gilmore, Jr.,
John Van Geldern, et al.,
Plaintiffs,

vs.

Thomas C. Lynch, Attorney
General of California, et al.,
Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO: The Clerk of the above-entitled Court, and to Counsel for Plaintiffs:

Please Take Notice that defendants, and each of them, hereby appeal to the Supreme Court of the United States from that portion of the judgment of this Court, filed May 28, 1970, which enjoins defendants from "enforcing Prison Regulation 330-041."

This appeal is taken under Title 28, United States Code, section 1253.

Dated: June 25, 1970

Thomas C. Lynch, Attorney
General of California

Robert R. Granucci
Deputy Attorney General

George R. Nock
Deputy Attorney General
Attorneys for Defendants-Appellants

Original Filed June 25 1970,
Clerk, U.S. Dist. Court, San Francisco.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 21 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

70-9

No. ~~552~~

THOMAS C. LYNCH, et al., *Appellants*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR THE APPELLANTS

EVELLE J. YOUNGER,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General,
ROBERT R. GRANUCCI,
Deputy Attorney General,
GEORGE R. NOCK,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-3335,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Topical Index

	Page
Opinions Below	1
Jurisdiction	2
Regulations Involved	3
Question Presented	4
Statement of the Case and the Facts	4
Summary of Argument	6
Argument	9
I. This Court has jurisdiction to hear the instant appeal	9
II. The Constitution does not compel prison administrators to furnish inmates with extensive law libraries or alternative legal assistance	15
III. The relief granted by the District Court exceeds the scope of relief permitted by stipulation of the parties	29
IV. The Eleventh Amendment bars the issuance by a federal court of a mandatory injunction against state officers which can be complied with only through legislative appropriation	32
Conclusion	38

Table of Authorities

Cases	Pages
Austin v. Harris, 226 F.Supp. 304 (W.D. Mo. 1964)	19
Barber v. Page, 239 F.Supp. 265 (E.D. Okla. 1965), rev'd on other grounds, 390 U.S. 719 (1968)	18
Bolden v. Pegelow, 218 F.Supp. 152 (E.D. Va. 1963)	18
Coonts v. Wainwright, 282 F.Supp. 893 (N.D. Fla. 1968)	18
Dews v. Henry, 297 F.Supp. 587 (D. Ariz. 1969)	33
Douglas v. California, 372 U.S. 353 (1963)	27, 28, 35

Pages

Ex parte Hull, 312 U.S. 546 (1941) 19

Fitts v. McGhee, 172 U.S. 516 (1899) 32
Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945) 32, 33, 35, 37

Gilmore v. Lynch, 319 F.Supp. 105 (1970) 5
Gilmore v. Lynch, 400 F.2d 228 (1968) 1, 2, 4
Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) 35
Griffin v. Illinois, 351 U.S. 12 (1956) 27, 35

Harrison Constr. Co. v. Ohio Turnpike Comm'n, 272 F.2d 337 (6th Cir. 1959) 33
Hatfield v. Bailleux, 292 F.2d 632 (9th Cir.), cert. denied, 368 U.S. 862 (1961) 17, 18, 19
Hergenreter v. Hayden, 295 F.Supp. 251 (D. Kan. 1968) 33
Hill v. Nelson, 272 F.Supp. 790 (N.D. Cal. 1967) 36
Hooker v. United States District Court, Central District of California, 380 F.2d 5 (9th Cir. 1967) 22

In re Allison, 66 Cal.2d 282, 425 P.2d 193, 57 Cal.Rptr. 593 (1967) 18
In re Harrell, 2 Cal.3d 675, 470 P.2d 640, 87 Cal.Rptr. 504 (1970) 36
In re Schoengarth, 66 Cal.2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967) 18, 19

Johnson v. Avery, 252 F.Supp. 783 (M.D. Tenn. 1966), rev'd on other grounds, 382 F.2d 353 (6th Cir. 1967), judgment of Court of Appeals rev'd on other grounds, 393 U.S. 483 (1969) 18, 19, 24
Johnson v. Muelberger, 340 U.S. 581 (1950) 10

Kirker v. Moore, 308 F.Supp. 615 (S.D. W.Va. 1970) 36
Koon v. Bottolfsen, 60 F.Supp. 316 (D. Idaho 1944) 36, 37

Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965) 19

Mason v. Pelkes, 57 Idaho 10, 59 P.2d 1067 (1936) 10, 11

Peinado v. Adult Authority, 405 F.2d 1185 (9th Cir.), cert. denied, 395 U.S. 968 (1969) 36
Pelkes v. Mason, 299 U.S. 615 (1937) 11
Pennsylvania P.U.C. v. Pennsylvania R. Co., 392 U.S. 281 (1965) 15
People v. Shipman, 62 Cal.2d 226, 397 P.2d 993, 42 Cal. Rptr. 1 (1965) 29

Pages

Phillips v. United States, 312 U.S. 246 (1941) 15

Roberts v. Pepersack, 256 F.Supp. 415 (D. Md. 1966) 18

Schackman v. Arnebergh, 387 U.S. 427 (1967) 11

Shepheard v. Godwin, 280 F.Supp. 869 (E.D. Va. 1968) 33

Sunshine Anthracite Co. v. Adkins, 310 U.S. 381 (1940) 10

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 14

Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) 10, 11

United States v. U.S. Smelting Co., 339 U.S. 186 (1950) 12

United States ex rel. Mayberry v. Prasse, 225 F.Supp. 752 (E.D. Pa. 1963) 19

United States ex rel. Stuart v. Yeager, 293 F.Supp. 1079 (D. N.J. 1968) 18

United States ex rel. Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965) 18

Westberry v. Fisher, 309 F.Supp. 12 (D. Me. 1970) 34

Williams v. Dandridge, 297 F.Supp. 450 (D. Md. 1968) 33

Wilson v. City of Port Lavaca, 391 U.S. 352 (1968) 15

Texts and Other Authorities

Larsen, A Prisoner Looks at Writ Writing, 56 Cal. L. Rev. 342 (1968) 24

Sokol, Federal Habeas Corpus (2d ed. 1969) 20, 21, 22

Constitution

United States Constitution:

Eleventh Amendment 8, 32, 33, 34, 35, 37, 38

United States Code

28 U.S.C. §1253 ..... 2, 9

28 U.S.C. §1292(b) 2, 4

28 U.S.C. §2281 ..... 2, 9

28 U.S.C. §2284 2

In the Supreme Court
OF THE
United States

OCTOBER TERM 1970

No. 582

THOMAS C. LYNCH, et al.,
Appellants,

vs.

ROBERT O. GILMORE, JR., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Northern District of California, filed May 28, 1970, is reported at 319 F.Supp. 105, and is also included in the Appendix at 92-106. The prior opinion of the United States Court of Appeals for the Ninth Circuit, dated August 16, 1968, is reported at 400 F.2d 228, and is included in the Appendix at 28-32. The order of this Court denying certiorari to review the judgment of the Court of

Appeals appears at 393 U.S. 1092 (1969). The original order of the District Court denying the motion to convene a three-judge district court is not reported, but is included in the Appendix at 26-27.

JURISDICTION

This appeal is from an order granting an injunction, entered by a three-judge district court convened pursuant to Title 28, United States Code, sections 2281 and 2284. Assuming the jurisdiction of the court below to act as a statutory three-judge district court, the jurisdiction of this Court to review the decision of the District Court by direct appeal is conferred by Title 28, United States Code, section 1253.

The jurisdiction of the court below to act as a statutory three-judge district court was established in the following manner: a single judge of the United States District Court for the Northern District of California filed an amended order, dated July 6, 1967, denying plaintiffs' motion to convene a three-judge district court, and certifying the existence of a controlling question of law (App. 26-27). Pursuant to Title 28, United States Code, section 1292(b), a special appeal was taken to the Court of Appeals for the Ninth Circuit, the sole issue being whether one or more issues raised by the complaint were required to be heard and determined by a court of three judges. In an opinion filed August 16, 1968, the Court of Appeals answered that question in the affirmative, reversing the order of the District Court. *Gilmore v. Lynch,* 400 F.2d 228 (1968); App. 28-32. Defendants below (appellants

herein) filed a petition for a writ of certiorari, which was denied, 393 U.S. 1092 (1969).

REGULATIONS INVOLVED

California Department of Corrections Administrative Manual Paragraphs 330.041 and 330.042 provide:

330.041

There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

1. The California Penal Code
2. The California Welfare and Institutions Code
3. The California Health and Safety Code
4. The California Vechicle Code
5. The United States and California Constitutions
6. A recognized law dictionary (such as Black's)
7. Witkin's California Criminal Procedures (Bender Moss Co.)
8. Subscription to California Weekly Digest
9. California Rules of Court
10. Rules of the United States Court of Appeals (Ninth Circuit)
11. Rules of United States Supreme Court

330.042

Sufficient copies will be maintained to provide reasonable access on not less than a weekly basis.

(App. 41, 93, 94 n.2).

QUESTION PRESENTED

Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to provide inmates with professional or quasi-professional legal assistance?

STATEMENT OF THE CASE AND THE FACTS

On October 27, 1966, plaintiffs, indigent California state prisoners, filed a complaint in the court below (App. 2). Counsel was appointed to represent plaintiffs on January 1, 1967 (App. 3), and on April 3, 1967, counsel filed an amended complaint, attacking the constitutionality of the regulations involved in the instant appeal, and making allegations not related to the instant appeal and seeking relief on the basis of such allegations (App. 5, 11-23). The complaint requested that a three-judge district court be convened (App. 18). On July 6, 1967, a United States District Judge filed an amended order denying plaintiffs' motion for the convening of a three-judge district court. The order certified the existence of a controlling question of law (App. 26-27).

Pursuant to Title 28, United States Code, section 1292(b), an appeal was taken to the Court of Appeals for the Ninth Circuit from the order denying the motion. That court reversed the order of the District Court, and remanded for further proceedings looking toward the convening of a three-judge court. *Gilmore v. Lynch*, 400 F.2d 228 (1968) (App. 28-32). Defendants (appellants herein) filed a petition for writ of

certiorari, contending solely that the Court of Appeal erred in holding that a three-judge district court was required. The petition was unanimously denied by this Court. 393 U.S. 1092 (1969).

Following remand, a three-judge district court was duly convened, and on February 9, 1970, the parties filed a document entitled "Stipulation of Settled Statement of Issues," with appendices. This document set forth the stipulated issues, and the stipulated relief to be granted or denied, depending upon the three-judge court's resolution of each issue (App. 33-40). The appendices to this stipulation contained the prison regulations and other materials relevant to a determination of these issues (App. 41-91).

After oral argument, the three-judge District Court entered its order granting relief. The court held unconstitutional the regulations involved, enjoined their enforcement, and ordered defendants to prepare and submit for court approval new regulations either greatly expanding the content of prison law libraries, or providing inmates with the assistance of lawyers or law students in the preparation of their legal papers, or both. *Gilmore v. Lynch,* 319 F.Supp. 105 (1970); App. 92-106. Notice of appeal by defendants was filed June 25, 1970. On August 14, 1970, the district court entered an order staying that portion of its order requiring defendants to file new or amended regulations (App. 107).

The Jurisdictional Statement was filed August 22, 1970. Both parties thereafter, at the request of the Court, filed memoranda on the jurisdiction of the

three-judge district court. Review was granted on February 22, 1971, by the following order:

> "The motion of the appellees for leave to proceed in forma pauperis is granted. Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits." 39 U.S.L.W. 3359.

SUMMARY OF ARGUMENT

This Court has jurisdiction to hear the instant appeal. Given the jurisdiction of the District Court to act in the capacity of a statutory three-judge district court, this Court's jurisdiction to hear the instant appeal follows as a matter of course. The jurisdiction of the District Court is clearly established by the prior history of this case. The Court of Appeals for the Ninth Circuit held that a three-judge district court was required for litigation of the issues now presented to this Court on appeal. Defendants sought certiorari to review the judgment of the Court of Appeals, but the petition was denied. The determination that a three-judge court was required thus constitutes a final judgment, which is res judicata upon the issue of the three-judge court's jurisdiction. This Court should not extend the inquiry as to its own jurisdiction to the point of opening up the fully and finally adjudicated question of the jurisdiction of the court below. At the very least, the determination of the Court of Appeals that a three-judge court was required is law of the case and this Court, having declined to review that determination, should now fol-

low it. To do otherwise would produce unjustifiable delay, prejudicial to both parties, in the resolution of a lawsuit already long delayed.

On the merits, the District Court was wrong in concluding that the Constitution obliges the states to furnish the inmates of its prisons with extensive law libraries or, in the alternative, a corps of lawyers or law students to assist the prisoners in the preparation of their legal pleadings. The decision of the District Court is in clear conflict with every other state and federal court decision which has considered the question. Prison inmates are ill-equipped by education or intelligence to utilize law books, the arcane tools of the lawyer's trade. Even for those few inmates who may be able to understand law books, their use provides only marginal value, if any. The types of legal documents prepared by prisoners—habeas corpus petitions and Civil Rights Act complaints—demand only a simple statement of facts. Legal citations are unnecessary and, in the hands of the unskilled, may constitute a positive impediment to the consideration of factual claims. The impracticability of supplying massive infusions of legal talent to draft such documents for prisoners is patent. There are simply not enough available lawyers or willing law students. An initial claim for relief, consisting of a simple factual statement, may be stated as readily by an inmate or jailhouse lawyer as by an attorney or law student. When such a claim has been presented to the courts, an attorney will be appointed where needed to advance the prisoner's claims.

The District Court also erred when it granted relief in excess of that which the parties stipulated may be granted. This stipulated relief was the maintenance of the status quo—the nondestruction of existing law books in prison libraries, and the injunction against enforcement of a rule providing for a standardized and exclusive list of law books for each prison library. By ordering the defendants to provide greatly expanded law libraries or professional legal services, the District Court acted in contravention of the stipulation of the parties, and its action is to that extent void.

Finally, the relief granted by the District Court violates the Eleventh Amendment. This amendment, forbidding suits against a state, has been interpreted to bar suits which seek satisfaction of money judgments out of state treasuries, and, more specifically, any relief which can only be afforded by requiring disbursements from state treasuries or requiring legislative appropriations. The mandatory injunction granted by the District Court requires the submission of rules and regulations which can be implemented only through legislative appropriation. To this extent, the order of the District Court violates the Eleventh Amendment and must be reversed.

ARGUMENT

I

THIS COURT HAS JURISDICTION TO HEAR THE INSTANT APPEAL.

Given the jurisdiction of the court below to act as a statutory three-judge court pursuant to Title 28, United States Code, section 2281, the jurisdiction of this Court to hear an appeal from an injunction issued by that court is clear beyond question. Title 28, United States Code, section 1253. Therefore, if there is any question as to the jurisdiction of this Court to hear the instant appeal, the question must relate to the jurisdiction of the court below to act as a statutory three-judge District Court. Our position is that the question of the jurisdiction of the District Court has been settled, and may not be reopened on this appeal, even for the purpose of determining the jurisdiction of this Court.

The procedural history of this case has been set out in detail, *supra*. However, a recapitulation is here in order. Plaintiffs below (appellees herein) originally filed a motion before a single judge for the convening of a three-judge district court. Defendants below (appellants herein) opposed the motion. The single judge refused to convene a three-judge district court, but certified the question of the necessity for such a court to the Court of Appeals. A special appeal taken to that court resulted in reversal of the order, the Court of Appeals holding that a three-judge district court was required to adjudicate the question of the constitutionality of the prison regulations involved.

Defendants disagreed, and filed a petition for certiorari in this Court, arguing as vigorously as possible that a three-judge district court was not required. This Court denied certiorari, without recorded dissent. Thereafter, the three-judge district court was duly convened and proceeded to adjudicate the case.

Thus, it cannot be denied that the issue of the jurisdiction of the court below to act as a statutory three-judge district court has been determined by a final judgment. As such, the question of the jurisdiction of the court below is res judicata.

It is proper to apply the doctrine of res judicata even to questions of subject-matter jurisdiction. As this Court has held, "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well as to jurisdiction of subject matter as of the parties." *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939) (footnotes omitted). *Accord, Johnson v. Muelberger*, 340 U.S. 581, 585 (1950); *Sunshine Anthracite Co. v. Adkins*, 310 U.S. 381, 403 (1940). Nor can it be argued that the doctrine of res judicata is inapplicable when the question adjudicated is purely one of law, involving no issues of fact. For in *Treinies v. Sunshine Mining Co., supra*, the jurisdictional decision to which this Court accorded res judicata effect was purely one of law.[1]

[1]This fact does not appear clearly from the face of this Court's opinion, but is abundantly clear upon reading a case cited in the opinion. At 308 U.S. 69 and n.3, this court cited the case of *Mason v. Pelkes*, 57 Idaho 10, 59 P.2d 1087 (1936), which was the decision of the Idaho Supreme Court, determining an issue of

In *Schackman v. Arnebergh*, 387 U.S. 427 (1967), this Court settled a troublesome question of law by holding that review of an order denying a motion to convene a three-judge district court may be had, in the first instance, only in the Court of Appeals. The decision was certainly a proper one, in view of the fact that the only alternative tribunal to review such a determination question is this Court itself, which is far too busy to suffer the additional burden of reviewing orders denying motions to convene a three-judge district court. But in conferring that responsibility on the courts of appeals, this Court in effect imposed upon itself the correlative obligation of respecting the judgments of those courts, unless this Court chooses to review those judgments on direct attack, by certiorari. Not only would a refusal to abide by such judgments be at odds with normal rules of appellate procedure, but it would inject an intolerable uncertainty into the law. When a judgment of a court of appeals determining the jurisdiction of a district court has become final, and the parties in the district court have relied thereon, such judg-

---

jurisdiction, which this Court held res judicata in *Treinies*. A reading of that opinion shows that the Idaho Supreme Court had held that a decree of the Washington State probate court was void as having been entered without subject-matter jurisdiction. The decision was based on the unrebutted presumption, necessarily required in Idaho courts, that foreign law is the same as that of the State of Idaho. 59 P.2d at 1098-99. This Court denied certiorari. *Pelkes v. Mason*, 299 U.S. 615 (1937). Although the propriety of the Idaho determination of the jurisdiction of the Washington court was certainly doubtful, this Court held: "It is unnecessary to consider whether the Idaho determination after the jurisdiction of the Washington court was properly made. . . . [T]he procedure [by which such determinations are made] is subject to question only on direct appeal." 308 U.S. at 77 n.21.

ment should not be subject to collateral attack, either by the parties or by this Court.

Although no case has been found directly deciding the question of whether the doctrine of res judicata is applicable to the resolution of jurisdictional issues upon which the jurisdiction of this Court itself depends, we see no reason why the principles set out above should not apply. While the jurisdiction of this Court must, of course, clearly appear, it may appear as well by adjudication of issues of law as by adjudication of issues of fact. And there is no conflict between the doctrine of res judicata and the power of this Court to determine its own jurisdiction. There is a final judgment determining the jurisdiction of the three-judge district court. This judgment should, under the doctrine of res judicata, be regarded as binding on this Court for the purpose of determining its jurisdiction to hear the instant appeal. This Court's undoubted power to determine its own jurisdiction should not and may not properly be exercised in such a manner as to reopen finally adjudicated questions of law.

Even if, the foregoing notwithstanding, it could be held that the determination of the Court of Appeals that a three-judge district court was required is properly regarded as law of the case, rather than res judicata, that decision should still be followed. It has been held that the doctrine of law of the case is "only a discretionary rule of practice." *United States v. U.S. Smelting Co.*, 339 U.S. 186, 199 (1950). If this means that this Court has discretion as to

whether or not to respect the ruling of the Court of Appeals, we submit that there is ample reason for this Court to exercise its discretion in favor of accepting the validity of such judgment. To do otherwise would be grossly inequitable. The fact that certiorari to review the judgment of the Court of Appeals was sought and denied does not make the judgment of that court any more or less final. But it does present a formidable equitable consideration to guide this Court in exercising its discretion. Both parties did everything in their power to assure that the question of the necessity for a three-judge district court was correctly and finally determined. Defendants' petition for certiorari represented the exhaustion of remedies to effect this end. If this Court had a question as to the propriety of the judgment of the Court of Appeals, it could have reviewed that judgment on certiorari. Since there were not four justices—indeed, so far as the record shows, there were not any justices—who felt the matter worthy of consideration, we submit that it would be grossly inequitable for this Court now to change its mind, and hold that the Court of Appeals was wrong after all, long after the parties and the court below have relied upon and followed the mandate of the Court of Appeals.

Any ruling at this late date that the three-judge court did not have jurisdiction would further delay a final disposition of an equity action now nearly 5 years old—an action founded upon an allegation that irreparable injury would result from delay in the granting of relief. "The purpose of the three-judge

scheme was in major part to expedite important litigation: It should not be interpreted in such a way that litigation, like the present one, is delayed while the proper composition of the tribunal is litigated." *Swift & Co. v. Wickham,* 382 U.S. 111, 124 (1965). Litigation of the composition of the tribunal to hear this case consumed nearly two years. If the decision produced by that litigation is held now not to have been final, the process of litigation will have consumed perhaps five years. Such an intolerable delay would not only prejudice both parties, but would reflect most unfavorably upon the efficiency of the judicial process.

In our petition for certiorari, we expressed ourselves on the merits of the three-judge issue. We do not choose now to take an antithetical position, even though we have the burden of sustaining jurisdiction on the instant appeal. Whatever this Court may consider, or whatever it may express, on the merits of the question of whether a three-judge court is required to determine the constitutionality of a prison regulation issued by a single individual, no considerations of law or equity could justify dismissal of this appeal on the ground that the issues presented by the amended complaint did not, after all, require resolution by a three-judge district court.

If, despite the foregoing, the Court is not satisfied with its jurisdiction in the instant matter, and dismisses the appeal, defendants request that we be given the benefit of this Court's uniform practice of providing for appellate review in the Court of Ap-

peals of district court orders which this Court has concluded need not have been heard by a three-judge court. A "protective appeal" in the Court of Appeals was not filed because there appeared to be no doubt, in light of the history of this case, of the jurisdiction of the three-judge district court. Where this Court has dismissed appeals from three-judge district courts and the appellant has not filed a protective appeal, it has been the uniform practice to vacate the order of the district court in order to allow the entry of a fresh decree which may be appealed to the appropriate court of appeals. *See, e.g., Wilson v. City of Port Lavaca,* 391 U.S. 352 (1968); *Pennsylvania P.U.C. v. Pennsylvania R. Co.,* 392 U.S. 281 (1965); *Phillips v. United States,* 312 U.S. 246, 254 (1941). If that policy is followed herein, we request that the order vacating the opinion of the district court be sufficiently broad to allow that court to reconsider its decision on the merits in the light of this Court's determination as to its jurisdiction.

II

THE CONSTITUTION DOES NOT COMPEL PRISON ADMINISTRATORS TO FURNISH INMATES WITH EXTENSIVE LAW LIBRARIES OR ALTERNATIVE LEGAL ASSISTANCE.

In an effort to standardize the law libraries of each of the 13 major correctional institutions of California, the Director of Corrections of California adopted a regulation providing for a standardized, exclusive set of law books for each institution library. This list

included the four California codes defining penal offenses, the United States and California Constitutions, a law dictionary, *California Criminal Procedure* by B. E. Witkin, the California Weekly Digest, and the court rules of California, the Court of Appeals for the Ninth Circuit, and this Court. The rule provided that sufficient copies will be maintained to provide reasonable access on not less than a weekly basis (App. 41). These regulations, if fully implemented,[2] would have resulted in the augmentation of the law libraries of most institutions, and the removal of some law books from libraries of two major institutions. In a suit to enjoin removal of existing law books and the proscription of augmentation of existing libraries to include books not on the standardized list, the District Court held that the law books provided by the state were constitutionally insufficient to meet the needs of prisoners, and ordered the defendant state officers to file proposed regulations greatly augmenting[3] the prison law libraries or, alternatively, providing for a system of assistance to inmates by lawyers or law students in the preparation of their legal pleadings.

---

[2]Pending disposition of this litigation, no law books have been destroyed or removed from any California correctional facility.

[3]The District Court did not state what library augmentations it would find constitutionally necessary, but it pointedly noted that "There are no annotated codes, no United States Reports, no federal reports, no California Reports . . . no copy of any part of the United States Code . . . no edition of the Rules of the Federal District Courts which receive a great many of the habeas corpus petitions, and all of the civil rights petitions filed by California prisoners . . . no other law books or journals, such as 'U.S. Law Week', on the list" (App. 99).

The decision of the District Court is plainly inconsistent with every other state and federal decision which has considered the question of the existence of an obligation on the part of a state to furnish the inmates of its prisons with law books. Each of these decisions has found no constitutional obligation of this sort whatever.

The leading case, which the District Court elected not to follow even though it is a decision of the Circuit in which the court below sits, is *Hatfield v. Bailleaux*, 292 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961), in which it was held:

> "State authorities have no obligation under the federal constitution to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform. All inmates are presumed to be confined under valid judgments and sentences. If an inmate believes he has a meritorious reason for attacking his, he must be given an opportunity to do so. But he has no due process right to spend his prison time or utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment.
>
> "Inmates have the constitutional right to waive counsel and act as their own lawyers, but this does not mean that a non-lawyer must be given the opportunity to acquire a legal education. One question which an inmate must decide in determining if he should represent himself is whether in view of his own competency and general prison regulations he can do so adequately. He must

> make the decision in the light of the circumstances existing. The state has no duty to alter the circumstances to conform with this decision." *Id.* at 640-41.

The District Court stated that the above language from *Hatfield* was dictum. We submit that it plainly was holding. The opinion reflects that the prison law library there under consideration was far less adequate than that involved in the instant appeal. *Id.* at 639. Although the question of the obligation of the state to furnish additional law books was not directly in issue, the plaintiffs not having even asserted the existence of such an obligation, the Ninth Circuit nonetheless unqualifiedly reversed an order enjoining prison officials from preventing inmates from purchasing their own law books.

The other decisions in accord are *United States ex rel. Stuart v. Yeager*, 293 F.Supp. 1079 (D.N.J. 1968); *Coonts v. Wainwright*, 282 F.Supp. 893 (N.D. Fla. 1968); *Roberts v. Pepersack*, 256 F.Supp. 415, 433-34 (D. Md. 1966); *Johnson v. Avery*, 252 F.Supp. 783, 787 (M.D. Tenn. 1966), *rev'd on other grounds*, 382 F.2d 353 (6th Cir., 1967), *judgment of the Court of Appeals rev'd on other grounds*, 393 U.S. 483 (1969); *United States ex rel. Wakeley v. Pennsylvania*, 247 F.Supp. 7 (E.D. Pa. 1965); *Barber v. Page*, 239 F. Supp. 265 (E.D. Okla. 1965), *rev'd on other grounds*, 390 U.S. 719 (1968); *Bolden v. Pegelow*, 218 F.Supp. 152, 154 (E.D. Va. 1963) (dealing with inmates of a federal institution); *In re Allison*, 66 Cal.2d 282, 290, 425 P.2d 193, 57 Cal.Rptr. 593 (1967); *In re Schoen-*

garth, 66 Cal.2d 295, 305, 425 P.2d 200, 57 Cal.Rptr. 600 (1967). *See also Lee v. Tahash,* 352 F.2d 970, 973-74 (8th Cir. 1965); *Austin v. Harris,* 226 F.Supp. 304, 307 (W.D. Mo. 1964). *Cf. United States ex rel. Mayberry v. Prasse,* 225 F.Supp. 752 (E.D. Pa. 1963).

The thrust of the opinion of the District Court is that furnishing prison inmates with extensive law libraries is necessary to preserve their right of "access to the courts," which has been defined as:

> "[T]he opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux, supra,* 290 F.2d at 637.

Historically, "access to the courts" has placed on prison officials only the passive, negative duty of noninterference, such as noninterference with communications between inmates and courts, as in *Ex parte Hull,* 312 U.S. 546 (1941), or noninterference with inmates in their efforts to provide one another with legal assistance, as in *Johnson v. Avery,* 393 U.S. 483 (1969). We argued below that the constitutional duty of prison officials in affording access to the court was limited largely to leaving inmates unhampered in their efforts to communicate with courts, judges, and attorneys, and to secure assistance in the prosecution of their legal actions. The District Court disagreed,

stating that "'Access to the courts', then, is a larger concept than that put forward by the State." (App. 100). But in redefining the concept of "access to the courts," the District Court enlarged it to the point of producing elephantiasis.

Heretofore, the extent of an affirmative constitutional duty on the part of prison officials toward their charges has been to provide them with food, clothing, shelter, and medical care—in other words, the necessities of life. In finding that the Constitution commands defendant state prison officials to furnish inmates with vast law libraries, the District Court has equated the luxuries of litigation with the necessities of life. Before a state can be directed to expend substantial sums of money to furnish prisoners with law libraries, it must clearly appear that the absence of such law libraries denies inmates a fundamental constitutional right applicable to prisoners. The rights found by the District Court to have been abridged are access to the courts and equal protection of the laws. But in fact, neither right is violated by the absence of large prison law libraries.

Failure on the part of prison law officials to furnish prisoners with extensive law book collections can abridge the right of access to the courts, if at all, only if law books are necessary to insure that prisoner claims are fully considered by the courts. But they are not. A petition for writ of habeas corpus, or a complaint filed under the Civil Rights Act, need and should merely set forth a brief statement of the facts upon which the pleader's claim is based. *Sokol, Fed-*

eral Habeas Corpus, 92-94 (2d ed. 1969). Legal citations and arguments are no proper part of a petition for habeas corpus. Moreover, extensive citations by those untrained in the law may, and commonly do, obscure essential factual contentions to the point where a colorably meritorious claim may go undetected. The idea of habeas corpus petitions is simply to get the facts before the court and allow the court to apply the law.

> "Habeas corpus petitions, as the majority notes, are relatively easy to prepare; they need only set out the facts giving rise to a claim for relief and the judge will apply the law, appointing a lawyer for the prisoner and giving him a hearing when appropriate." *Johnson v. Avery, supra,* 393 U.S. at 500 (dissenting opinion of Mr. Justice White, joined by Mr. Justice Black).

But the District Court feels differently, taking "notice that more than simple 'facts' are needed in order to file an adequate petition for relief by way of habeas corpus. A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent." (App. 100). As an abstract proposition this is true. But it has little or no application to the situation of the California prisoner. The record in the instant case includes a copy of the habeas corpus forms for federal and state courts which are available free of charge to all California state prisoners. These forms consist of detailed questionnaires designed to elicit from the petitioner the basic facts needed to determine the merits of his claim, including the question of whether he has

exhausted state remedies. So comprehensive are these forms that district courts in the Ninth Circuit have discretion to refuse to consider supplementary legal memoranda appended to the forms. *Hooker v. United States District Court, Central District of California,* 380 F.2d 5 (9th Cir. 1967). While the forms do not expressly instruct the petitioner as to the District in which he should file his petition, or that the warden or superintendent of the institutiton in which he is confined should technically be named as respondent, it has been our experience (and one not challenged by the District Court) that prisoners have little difficulty ascertaining these facts.

At any rate, the possibility that the law books provided inmates under the regulation in question may not fully apprise them of the rules of jurisdiction, venue, and proper parties respondent does not justify the ordering of massive augmentation of prison law libraries. No more than three inexpensive volumes[4] added to the list in question would provide all of the procedural information a prisoner could possibly desire. Yet the court below has not indicated that it would accept such a simple augmentation of the law library list. Instead, the opinion appears to order that appellants must provide numerous complete sets of case reports, which have little or no value in apprising inmates of the "rules concerning venue, juris-

[4] *E.g.*, a volume containing the Judicial Code, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure; a volume containing the court rules of the federal district courts in California; and SOKOL, FEDERAL HABEAS CORPUS (2d ed. 1969).

diction, exhaustion of remedies and proper parties respondent."

At one point, the District Court seems to say that prisoners must, in preparing habeas corpus pleadings, cite legal authorities, because lawyers do so:

> "When the Return is filed, it is never without abundant citations to legal authority, and a proper traverse must take cognizance of these points. No attorney filing a habeas petition omits a statement of points and authorities, and neither does the State's attorney in responding to one." (App. 100).

This observation misses the point. The convict filing a habeas corpus petition cannot be, and is not, expected to discuss, or even to understand, the law. The habeas petition, in its early stages, should not be tested in the crucible of an adversary proceeding. Its function should be solely to bring to the attention of the courts the factual claims upon which the convict bases his contention that he is being illegally treated. The attorney for the respondent may, and commonly does, point out authorities tending to show that a given petition does not state grounds for relief. His role in this regard is primarily to assist the court. If the judge concludes that an adversary determination of questions of law or fact is necessary for proper adjudication of the inmate's claim, he will appoint an attorney for him. Nor is it really accurate to state that "a proper traverse must take cognizance of these points [*i.e.*, legal citations]." The function of a traverse is simply to deny the factual allegations

of the return and reaffirm those of the petition. Legal authorities are no more a necessary or proper part of a traverse than of a petition.

The remaining proposition relied on in support of the district court's ruling is that the habeas petitioner "should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing." (App. 100). True enough, but the conclusion that hundreds of volumes of case books are going to tell a prisoner which facts of his case to put in a habeas petition is a non sequitur. Case reports are written for lawyers, not laymen. Only the most sophisticated layman can make effective use of these books. And such sophisticated laymen are in short supply in any prison.

> "Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson v. Avery, supra,* 393 U.S. at 487.

A particular highly literate prisoner, while appearing on the one hand to call for more law books, admits that precious few inmates have the educational background to use them properly. Larsen, *A Prisoner Looks At Writ Writing,* 56 CALIF. L. REV., 342, 352 (1968). If any books will be of material aid to a prisoner honestly wishing to find out if the facts of his case render his custody invalid or colorably so, they are such books as are found on the law library list here under review—*e.g.,* Witkin's valuable work on

California criminal procedure, and the California Weekly Digest, which presents digests of significant decisions of the California courts and this Court. Material digested and synthesized into understandable form would be far more valuable than the raw stuff of case reports. Expecting a high-school dropout to master the complexities of a fifty-foot shelf of case reports would be no more realistic than expecting him to perform a cholecystectomy. He may do a competent job, but the odds are against it.

If there is no constitutional duty on the part of the states to give their prisoners vast law libraries, there is no alternative duty to provide them with legal counsel to draft their habeas petitions. Since a prisoner need only state facts, and not make legal arguments, and since he has access to "jailhouse lawyers" to assist him, he has no constitutional right to post-appellate assistance of counsel at state expense. This is not to say that a prisoner would find the services of counsel wholly without advantage; we say simply that the assistance of counsel is not a necessary part of the concept of access to the courts, since a prisoner can get his claims heard, in the first instance, without such assistance. The availability of appointed counsel when a facially meritorious petition is filed fully protects convicts' rights to their day in court.

And for much the same reasons, refusal of a state to undertake the enormous expense of providing prisoners with huge law libraries or professional assistance does not deny indigent prisoners the equal protection of the law. The only rationale for the equal

protection argument advanced by appellees is that indigent prisoners without extensive law libraries or the services of counsel are invidiously discriminated against vis-a-vis the "affluent convict," who can hire an attorney to prosecute his post-conviction proceedings. But all the indigent defendant need do to secure the appointment of counsel to represent him is to present to a court a simple factual statement showing that he has a colorably meritorious claim to relief. This he can do without law books and without lawyers. A lawyer can doubtless state the facts with more clarity than the average prisoner, but given the courts' uniform liberality in reading prisoner-prepared pleadings, a lawyer's greater skill and draftsmanship will seldom if ever make a difference between an inmate's being granted or denied a hearing. However skillful counsel may be, he cannot supply, if it is otherwise lacking, the one thing which will give the convict relief—the existence of the state of facts showing that he is entitled to relief.

It has never been held that convicts are entitled to the assistance of counsel, as a matter of right, in preparing their initial pleadings in habeas corpus or Civil Rights Act cases. Even the District Court did not find such a right to counsel, except as an alternative to the augmentation of prison law libraries. Since we have demonstrated the absence of a constitutional right to expanded law libraries, it follows that there is no alternative right to the assistance of counsel.

At any rate, the determination of equal protection questions by using as a standard the so-called "afflu-

ent convict" is altogether illusory. Some of this Court's decisions in the area of equal protection for state criminal defendants have not been completely realistic. For example, *Douglas v. California,* 372 U.S. 353 (1963), providing for appointed counsel on appeal, and *Griffin v. Illinois,* 351 U.S. 12 (1956), providing for free transcripts on appeal. We do not attack these decisions, but point out the fragility of some of their foundational bases. For example, in focusing on the "indigent" vis-a-vis the "affluent" defendant, the decisions ignore the great middle range, who have sufficient assets so as not to qualify as indigents, but whose assets are sufficiently limited that the decision as to how to expend them involves a careful and often painful weighing of alternatives. A convicted defendant with $2500 in the bank and little prospect for a successful appeal will normally choose to forego appeal in order to allow the money to be used for the support of his family. As a result of such decisions as *Douglas* and *Griffin,* the poor may have rights often equal to those of the rich, but the rights of both may be greater than those of the bulk of the citizenry.

If the concept of equal protection advanced in *Douglas* and *Griffin* has not proved entirely workable in those situations, it would be far less workable and far more unrealistic should it be extended to the situation at bar. By the time a convict has exhausted the processes of trial and appeal, or foregone the latter, the amount of his assets available for further legal proceedings is likely to be virtually non-

existent. The same exhaustion of the appellate process has greatly strengthened the presumption of validity given to his conviction, rendering prospects for a successful collateral attack exceedingly remote. Only a tiny handful of convicts have available to them unlimited financial resources with which to conduct further legal proceedings. Few if any convicts of moderate means would choose to expend their resources on legal actions holding little if any hope of ultimate success. To hold that the state is constitutionally obliged to furnish all indigent convicts with the legal resources available in fact only to the occasional wife-murdering millionaire, corrupt union leader, or syndicate operative, who cannot escape imprisonment, would be ludicrous indeed. As enormous financial inequality exists among citizens in society at large, so must some financial inequality inhere among citizens in their relations with the state. Only a handful of persons accused of crime are financially able to retain one of the half-dozen ablest criminal attorneys in the country. To hold that the state must provide to all what is otherwise available only to the few is as unworkable and unrealistic a concept of egalitarianism as the pernicious converse that the state must deprive the few of what is not available to all. Neither concept has been accepted in this nation as a matter of political economy, and neither should be as a matter of jurisprudential doctrine.

Rather, lines can be and are drawn, and this Court often sustains them. *Douglas v. California, supra.* California has drawn the line by holding that counsel

will be appointed for an indigent person (whether convict or not) seeking collaterally to attack his conviction if he simply presents to the court a brief factual statement showing he may be entitled to relief. *People v. Shipman*, 62 Cal.2d 226, 397 P.2d 993, 42 Cal.Rptr. 1 (1965). We submit that this rule adequately balances the competing claims of the indigent convicted person against the public dollar and the limited pool of available legal talent.

For the foregoing reasons, the refusal of California to expend its limited financial resources on lavish collections of legal volumes for prison libraries does not deny indigent convicts either reasonable access to the courts or equal protection of the laws. The District Court therefore erred in holding to the contrary, and its order must be reversed.

III

THE RELIEF GRANTED BY THE DISTRICT COURT EXCEEDS THE SCOPE OF RELIEF PERMITTED BY STIPULATION OF THE PARTIES.

In an effort to simplify the matters to be determined by the three-judge court, the parties entered into a stipulation of the issues to be decided and the relief to be granted, depending upon the resolution of each issue. The only issues relevant to the instant appeal were Issues Nos. 1 and 2, which were, in essence, whether the regulations involved in the instant appeal denied indigent inmates either reasonable access to the courts or equal protection of the

laws. The stipulated relief to be granted if these issues were decided in the affirmative was as follows:

> "If the Court decides the question embodying Issue No. 1, in the affirmative, then the provisions of Department of Corrections' Transmittal Letter 26/66, having to do with access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments and pleadings, shall be declared to be an unconstitutional infringement on prisoner access to the courts, in so far as the said Transmittal Letter affects indigent state prisoners, and the defendants, and each of them, shall be enjoined and restrained from enforcing such provisions of the said Transmittal Letter; the defendants, and each of them, shall be further enjoined and restrained from prohibiting inmates of California penal institutions from possessing law books or legal opinions, or other materials utilized in preparation of legal petitions, arguments, and pleadings, except in so far as the defendants, or any of them, may regulate inmate possession of books in general because of space limitations or fire hazard; and shall be further enjoined and restrained from establishing exclusive, standardized lists of law books for all prison law libraries, and from destroying or removing from prison law libraries any existing law books, except as such books become useless because of excessive wear or mutilation." (App. 36).

Essentially identical relief was to be granted on a resolution of the second issue in the affirmative. (App. 37).

The actual relief given by the court was not merely a declaration of unconstitutionality of the regulations involved, and an injunction against their enforcement, which were embraced in the stipulated relief, but in addition, an order mandating the defendants either to augment substantially the existing prison law libraries or provide the assistance of counsel or law students for prisoners desiring it. This kind of relief was clearly outside the scope of the stipulated relief, and went far beyond even the relief prayed for by plaintiffs, who did not suggest that the District Court even had the power to give the relief actually ordered.

By entering into the stipulation, defendants gave up their right to a hearing and determination on their noticed motions to dismiss or for summary judgment, and the right to present evidence refuting the factual conclusions which ultimately formed the basis for the decision of the District Court. Defendants gave up these rights in reliance on the proposition that any relief granted would not exceed that embraced within the terms of the stipulation. Defendants did not even have an opportunity to argue against the relief ultimately granted by the District Court, being deprived of notice that such relief might be granted. Under the circumstances, the stipulation should have been binding on the District Court, at least in the absence of notice that the District Court intended to disregard it, and the failure of the District Court to recognize the stipulation was inequitable.

Nor is it significant that the stipulation stated that certain relief may be granted "if it please the Court . . . ." (App. 35). This language might have given the court below some authority to modify in some particulars the stipulated relief. However, it did not give that court the right, without notice, to disregard the stipulation and grant relief neither contemplated by the stipulation nor prayed for in the amended complaint.

This error of the District Court in refusing to recognize the terms of the stipulation calls for outright reversal of the judgment. At the very least, it demands that the order of the District Court be vacated and the matter remanded for further proceedings.

IV

THE ELEVENTH AMENDMENT BARS THE ISSUANCE BY A FEDERAL COURT OF A MANDATORY INJUNCTION AGAINST STATE OFFICERS WHICH CAN BE COMPLIED WITH ONLY THROUGH LEGISLATIVE APPROPRIATION.

The Eleventh Amendment "denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). In determining the applicability of the Eleventh Amendment, the question is not whether a state is a nominal party to the action, but whether it is the real party in interest. *Ibid.; Fitts v. McGhee*, 172 U.S. 516, 528 (1899).

While the Eleventh Amendment does not immunize state officers against damage actions directed against them personally, or bar the issuance of negative injunctive relief against them, it does bar the the granting of relief which has the effect of raiding the state treasury. *Ford Motor Co. v. Department of Treasury of Indiana, supra; Harrison Constr. Co. v. Ohio Turnpike Comm'n,* 272 F.2d 337, 340 (6th Cir. 1959). Thus, courts have held unconstitutional state statutes providing for maximum amounts of state welfare aid to any given family, without regard to the size of the family, and enjoined the enforcement of such statutes, but have held that they are without jurisdiction to order legislative appropriation of funds to provide for the necessary grants. *E.g., Dews v. Henry,* 297 F. Supp. 587 (D. Ariz. 1969); *Williams v. Dandridge,* 297 F.Supp. 450 (D. Md. 1968). Similarly, courts have invalidated, and enjoined the enforcement of, state statutes deducting from state aid to school districts some portion of the funds those school districts receive under the federal program for aid to impacted areas. But the same courts have always declared that they are without jurisdiction to order the Legislature to appropriate funds to reimburse the school districts for past unlawful deductions, on the ground that a decree requiring an appropriation by the Legislature would violate the Eleventh Amendment. *E.g., Hergenreter v. Hayden,* 295 F.Supp. 251, 256 (D. Kan. 1968); *Shepheard v. Godwin,* 280 F.Supp. 869, 876 (E.D. Va. 1968). The rationale is set out in detail in

Westberry v. Fisher, 309 F.Supp. 12, 18-20 (D. Me. 1970).[5]

In the instant case, the District Court has ordered the defendant state officers either to obtain extensive collections of law books for prison libraries or to provide prisoners with professional or quasi-professional legal assistance. Either alternative involves the expenditure of substantial amounts of money. We could not, in good faith, submit proposed regulations unless we could assure the court that those regulations could be fully implemented. None of the defendant state officers have control over finances that would permit the expenditures of such funds. The budget of the California Department of Corrections is legislatively mandated. It is broken down into categories such as salaries, academic education, vocational education, recreation, correctional industries, and the like, with numerous subcategories within each category. The defendants have no power to transfer funds from one or more budgeted categories in order to pay for large law libraries or attorneys. Thus, the only way to implement such regulations as the District Court has ordered us to submit for approval would be to obtain a legislative appropriation. Therefore, the only practical means of enforcing the order of the District Court would be to make the Governor and the legislators of California parties to the instant action and affirma-

[5]In *Westberry*, Judge Gignoux distinguished a number of welfare cases awarding retroactive payments of benefits wrongfully withheld, on the grounds that in all cases but one, the Eleventh Amendment had not been considered, and in that one, the Eleventh Amendment analysis was based on authority which did not support it. 309 F.Supp. at 20 & n.12.

tively direct them to appropriate such funds as may be required—an order flagrantly in violation of the Eleventh Amendment and brutally destructive of the federal-state relationships which the Amendment was adopted in order to preserve.

We are aware, of course, that this Court has empowered a district court to take the extreme step of ordering county supervisors to direct their taxing and spending powers in a certain manner. *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964). However, such an order does not transgress the Eleventh Amendment since the Amendment does not apply to suits against counties. "It has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights." *Id.* at 233.

We do not argue, of course, that this Court cannot, on direct review of state-court judgments, effectively order the disbursement of state funds. For example, in holding that states must provide indigents with appointed counsel and free transcripts on appeal, *Griffin v. Illinois, supra,* and *Douglas v. California, supra,* this Court obliged the states to expend considerable additional sums of money in the administration of the criminal laws. However, this was done on direct review of criminal convictions in state courts. *Cf. Ford Motor Co. v. Department of Treasury of Indiana, supra,* 323 U.S. at 470, indicating that a state-court suit against a state may be reviewed in this Court, even if it would be barred by the Eleventh Amendment had it been prosecuted in the federal courts.

There is no need to decide to what extent, if any, federal courts may oblige states to expend their funds in the exercise of the power of federal courts to fashion broad relief as an alternative to release from custody in habeas corpus cases. The instant case is definitely not a habeas corpus case. It has not been and may not be maintained as one. There has been no exhaustion of state remedies, *See Peinado v. Adult Authority*, 405 F.2d 1185 (9th Cir.), *cert. denied*, 395 U.S. 968 (1969). Furthermore, a class action in habeas corpus generally will not lie. *Hill v. Nelson*, 272 F. Supp. 790, 794 (N.D. Cal. 1967).

In the instant case, we might point out, this Court may well have the opportunity at some future date to review, free of the restrictions of the Eleventh Amendment, a decision as to the constitutional sufficiency of existing prison law libraries. The California Supreme Court, in *In re Harrell*, 2 Cal.3d 675, 695 & n.20, 470 P.2d 640, 87 Cal.Rptr. 504 (1970), has indicated a disposition to rule on this question after termination of the instant federal proceedings. This court would, of course, be free to review that ruling on certiorari to the California Supreme Court.

Our point is that an action in the federal courts under the Civil Rights Act does not permit the granting of relief which, though formally against individual defendants, is actually directed against the state, and requires the expenditure of funds from the state treasury. *See Kirker v. Moore*, 308 F.Supp. 615, 624-25 (S.D.W. Va. 1970); *Koon v. Bottolfsen*, 60 F. Supp. 316 (D. Idaho 1944):

> "This provision of the Constitution [the Eleventh Amendment] cannot be defeated by bringing an action of this kind against defendants who have no personal interest in the subject matter of the suit, when the relief prayed for against them, if granted, would require them to perform certain acts that are obligations of the state to perform. The defendants herein are not the real parties in interest, any judgment rendered would of necessity be directly against the State and its moneys. The Constitutional bar provided by the Eleventh Amendment cannot be indirectly set aside by suing the officers of the State individually where the claim for relief is an alleged breach of the State's contract." *Id.* at 322.

Though we have raised the Eleventh Amendment issue in this Court for the first time, we make no apology for so doing. As previously noted, the parties stipulated to the relief which might be granted by the District Court. That stipulated relief would not have been barred by the Eleventh Amendment. We had no notice that the District Court might grant relief barred by that Amendment, and therefore no opportunity to argue the issue in that court. Furthermore, an Eleventh Amendment issue may timely be raised initially in this Court:

> "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power with such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." *Ford Motor Co. v. Department of Treasury of Indiana, supra,* 323 U.S. at 467.

The District Court has decreed in the instant case relief which is as effectively directed against the State of California and its treasury as if the state were the only named party. This mandatory relief is plainly barred by the Eleventh Amendment, and to the extent that it grants this relief, the order of the District Court must be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court has jurisdiction to hear the instant appeal, and that the order of the District Court appealed from should be reversed.

Dated, April 22, 1971.

EVELLE J. YOUNGER,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General,
ROBERT R. GRANUCCI,
Deputy Attorney General,
GEORGE R. NOCK,
Deputy Attorney General,
Attorneys for Appellants.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 21 1971
E. ROBERT SEAV

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. ~~382~~ 70-9

THOMAS C. LYNCH, et al., *Appellants*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT AS AMICI CURIAE

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
STANLEY A. BASS
10 Columbus Circle
New York, New York 10019
ANTHONY G. AMSTERDAM
Stanford University
Stanford, California 94305
WILLIAM BENNETT TURNER
OSCAR WILLIAMS
ALICE DANIEL
12 Geary Street
San Francisco, California 94108
Attorneys for Amici Curiae.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Contents

	Page
Statement of interest of the amici	1
Opinions below	3
Jurisdiction	4
Question presented	4
Summary of argument	4
Argument	7
I. Introduction	7
A. The post-conviction plight of California prisoners	7
B. The decision of the court below	13
II. By depriving indigent prisoners of necessary legal resources to challenge their convictions or sentences, California effectively denies them access to the courts	16
1. Significance of California post-conviction proceedings	20
2. Necessary assistance required to obtain a fair hearing on post-conviction claims	21
3. The legal resources provided by the state	25
III. California's denial of necessary legal assistance to indigent prisoners deprives them of equal protection of the laws	28
IV. The eleventh amendment does not bar the relief ordered by the district court	32
Conclusion	34

Table of Authorities Cited

Cases	Pages
Anders v. California, 386 U.S. 738 (1967)	30
In re Banks, 4 Cal.3d 337, ___ P.2d ___ (1971)	10
Boddie v. Connecticut, 401 U.S. ___, 91 S.Ct. 780 (1971)	5, 16, 17, 18, 21
Burns v. Ohio, 360 U.S. 252 (1959)	29, 31
In re Chessman (1955) 44 Cal.2d 1, 278 P.2d 24	14
Cruz v. Beto, 391 F.2d 235 (5th Cir. 1968)	8
Douglas v. California, 372 U.S. 353 (1963)	5, 7, 8, 18, 20, 29, 33
Draper v. Washington, 372 U.S. 487 (1963)	30
Entsminger v. Iowa, 386 U.S. 748 (1967)	30
Gardner v. California, 393 U.S. 367 (1969)	6, 21, 30
Goldberg v. Kelly, 397 U.S. 254 (1970)	33
Goodwin v. Cardwell, 432 F.2d 521 (6th cer. 1971)	8
In re Greenfield, 11 Cal.App.3d 563, 89 Cal.Rptr. 847 (1970)	10, 24
Griffin v. Illinois, 351 U.S. 12 (1956)	17, 18, 29, 33, 34
In re Harrell, 2 Cal.3d 675, 470 P.2d 640 (1970)	14, 19
Ex parte Hull, 312 U.S. 546 (1941)	16
Johnson v. Avery, 393 U.S. 483 (1969)	5, 10, 16, 17, 18, 19, 24, 25, 26, 31
Kaufman v. United States, 394 U.S. 217 (1969)	16, 20
Lane v. Brown, 372 U.S. 477 (1963)	29
Long v. District Court, 385 U.S. 192 (1966)	30
Marino v. Ragen, 332 U.S. 561 (1947)	22
Meltzer v. C. Buck LeCraw & Co., 39 U.S.L.W. 3483 (May 3, 1971)	17
Mempa v. Rhay, 389 U.S. 128 (1967)	21
Mooney v. Holohan, 294 U.S. 703 (1935)	16
Nelson v. Peyton, 415 F.2d 1154 (4th Cir. 1969)	8

Pages

People v. Lyons, 46 Ill.2d 172, 263 N.E.2d 95 (1970) 27
Peters v. Rutledge, 397 F.2d 731 (5th Cir. 1968) 13, 28
Pointer v. Texas, 380 U.S. 400 (1965) 24

Reynolds v. Sims, 377 U.S. 533 (1964) 33
Rinaldi v. Yeager, 384 U.S. 305 (1966) 30, 31, 32
Roberts v. LaVallee, 389 U.S. 40 (1967) 30
Robinson v. California, 370 U.S. 660 (1962) 24
Rodriguez v. United States, 395 U.S. 327 (1969) 20

In re Schoengarth, 66 Cal.2d 295 14
In re Shipman, 62 Cal. 226, 42 Cal.Rptr. 1 (1965) 21
In re Smith, 3 Cal.3d 192, 474 P.2d 969 (1970) 10
Smith v. Bennett, 365 U.S. 708 (1961) 29
Still v. Fitzharris, 413 F.2d 977 (9th Cir. 1969) 8
In re Swain (1949) 34 Cal.2d 300, 209 P.2d 793 14
Swann v. Charlotte-Mecklenburg Board of Education, ____ U.S. ____, 91 S.Ct. 1267 (1971) 15, 33
Swenson v. Bosler, 386 U.S. 258 (1967) 8

Turner v. Fouche, 396 U.S. 346 (1970) 33

United States v. Simpson, 436 F.2d 163 (D.C. Cir. 1970) ... 27
United States ex rel. Smith v. McMann, 417 F.2d 648 (2d Cir. 1969) 8, 20
United States ex rel. Wissenfeld v. Wilkins, 281 F.2d 707 (2d Cir. 1960) 23

In re Williams, 1 Cal.3d 168, 460 P.2d 984 (1969) 9, 23
Williams v. Oklahoma City, 395 U.S. 458 (1969) 30
Wilson v. Wade, 396 U.S. 282 (1970) 20

Statutes, Rules and Regulations

28 U.S.C. Section 1253 4
28 U.S.C. Section 2281 4
28 U.S.C. Section 2284 4
Fed. R. Civ. P. 54(c) 32
Ark. R. Crim. Pro. 1D (Supp. 1969) 11
Cal. Govt. Code Section 27706(a) (West Supp. 1971) 8

Pages

Cal. P. C. Section 1265 21

Cal. P. C. Section 1475 22

Cal. P. C. Section 1508 22

Ind. Rule P. C. 1(I)(1) (Burns Spec. Supp. 1970) (1961) 11

Me. Rev. Stat. Ann. tit. 14, §5506 (1964) 11

Mo.Sup.Ct. R. 27.26(h)(i) 11

Mont. Rev. Code, Section 95-1004 (1969 Rpl. Vol.) 11

N.C. Gen. Stat., Section 15-219 (Supp. 1969) 11

Ohio Rev. Code, Section 2953.24 (Page's Supp. 1970) 11

Ore. Rev. Stat., Section 138.590 (1969-70) 11

S.D. Sess. Laws, ch. 121, Section 3 (1966) 11

Wyo. Stat. Ann., Section 7-408.4 (Supp. 1969) 11

Other Authorities

Annual Report of the Director of the Administrative Office of the United States Courts, 1969, Table C3 12

1970 Annual Report to the Governor and the Legislature, Judicial Council of California 22, 24

Burger, Remarks on the State of the Federal Judiciary, 56 A.B.A. J. 929 (1970) 12

California Criminal Law Practice, California Continuing Education of the Bar, 371-73 (1969) 22

5 Crim. L. Rptr. 2277-78 (1969) 26

Crime and Delinquency in California 1969, California Department of Justice, Bureau of Criminal Statistics 10

Criminal Appeals in California 1964-68, California Department of Justice, Bureau of Criminal Statistics 8

Note, Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970) 21, 26

Jacob and Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process, 18 Kan. L. Rev. 493 (1970) 22, 25, 26, 27

Pages

Krause, A Lawyer Looks at Writ Writing, 56 Cal. L. Rev. 371 (1968) 24, 27

Lay, Problems of Federal Habeas Corpus Involving State Prisoners, 45 F.R.D. 45 (1968) 27

Michelman, On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969) 31

Oliver, Postconviction Applications Viewed by a Federal Judge—Revisited, 45 F.R.D. 199 (1968) 27, 28

Prison Writ Writing: Three Essays, 56 Cal. L. Rev. 342 (1968) 20

The Recorder, June 11, 1971, at 1, col. 7 26

Representation of Indigent Criminal Defendants in Appellate Courts, 1970 Annual Report to the Governor and the Legislature, Judicial Council of California 9, 12

Note, State Post-Conviction Remedies and Federal Habeas Corpus, 12 William & Mary L. Rev. 149 (1970) 22

Witkin, Cal. Crim. Proc. 764-65 (1963) 22

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 582

THOMAS C. LYNCH, et al.,
Appellants,
vs.
ROBERT O. GILMORE, JR., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT AS AMICI CURIAE

STATEMENT OF INTEREST OF THE AMICI

The NAACP Legal Defense and Educational Fund, Inc. (the "Legal Defense Fund") is a non-profit corporation formed in 1939 under the laws of the State of New York. It was founded to assist black people who suffer injustice by reason of race or color to secure their basic rights through the legal process. The Legal Defense Fund is independent of other

organizations and is supported by contributions from the public.

The central purpose of the Legal Defense Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon black people and upon the poor, deprived and friendless, who too often are black people. To further this purpose, in 1967 the Legal Defense Fund established a separate corporation, the National Office for the Rights of the Indigent ("NORI"), having among its objectives the provision of legal representation to the poor in individual cases and the advocacy before appellate courts of changes in legal doctrine unjustly affecting the poor.

The Legal Defense Fund receives a very large volume of pleas for assistance from prisoners incarcerated in penal institutions and jails throughout the nation. Prisoners call upon the Legal Defense Fund to help in challenging constitutional error in their convictions and sentences, in coping with their civil problems (many of them relating to their indigency) and in bringing suits to achieve reform of outmoded and inhumane prison practices. The Legal Defense Fund and NORI cannot begin to provide representation or even counselling for the huge numbers of prisoners seeking their assistance.

The San Francisco office of the Legal Defense Fund receives a great number of requests for help from prisoners incarcerated in the State of California. Again, the prisoners request assistance and information not only with regard to the validity of their con-

victions and sentences, but also concerning their personal civil problems and their difficulties vis-à-vis the prison administration. They frequently ask us to reproduce and send them court decisions not otherwise available to them. While the Legal Defense Fund attempts to respond to as many of these pleas for assistance as possible, our limited staff and resources simply do not permit us to help in very many cases, regardless of whether the cases are meritorious. Accordingly, the Legal Defense Fund has a direct interest in having the states recognize their obligation to provide necessary legal resources for the persons whom they choose to imprison.

The Legal Defense Fund believes that the decision of the court below is sound as a matter of law and policy in recognizing that the state's denial of necessary legal resources to prisoners cannot be squared with the fundamental right of access to the courts, where such access is the only means of redressing a deprivation of liberty without due process. For this reason, we respectfully present our views on the issue before the Court. The parties have consented to the filing of a brief by *amici*, and copies of their letters of consent are being submitted to the Clerk with this brief.

OPINIONS BELOW

The opinion of the three-judge District Court, filed May 28, 1970, is reported at 319 F.Supp. 105 and is printed in the Appendix at pp. 92-106. The opinion

of the Court of Appeals for the Ninth Circuit on the jurisdictional question is reported at 400 F.2d 228 and is printed in the Appendix at pp. 28-32. The order of this Court denying certiorari to review the decision of the Court of Appeals is reported at 393 U.S. 1092 (1969).

JURISDICTION

This is an appeal from an order of a three-judge District Court convened pursuant to 28 U.S.C. Sections 2281 and 2284. On the assumption that the court below had jurisdiction to act as a statutory three-judge court, the jurisdiction of this Court on direct appeal is conferred by 28 U.S.C. Section 1253.[1]

QUESTION PRESENTED

Whether, by depriving indigent prisoners of legal resources necessary to present post-conviction challenges to errors in their convictions or sentences, California effectively denies them access to the courts in violation of the due process and equal protection clauses of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Convicted felons in California prisons whose convictions may be tainted by fundamental error face

---

[1]Both parties to this appeal have previously filed briefs supporting the jurisdiction of this Court. *Amici* do not intend to brief this question.

special difficulties in obtaining judicial review of their claims. California has not implemented *Douglas v. California,* 372 U.S. 353 (1963), by requiring that convicted defendants be notified either of their right to appeal or of their right to assigned counsel. As a consequence, many defendants fail to appeal through ignorance of their rights, and must rely on post-conviction proceedings as the only means of challenging the legality of their convictions. Despite the crucial nature of these proceedings and the urgency of the prisoners' need, California has not adopted any of the techniques suggested by this Court in *Johnson v. Avery,* 393 U.S. 483 (1969), for providing essential legal assistance to prisoners seeking access to the courts.

Due process of law requires that prisoners be afforded effective access to the courts to challenge convictions obtained in violation of their constitutional rights. Depriving them of the legal assistance necessary for preparing and presenting these claims effectively denies prisoners access to the only forums empowered to settle their disputes. *Boddie v. Connecticut,* 401 U.S. ....., 91 S. Ct. 789 (1971). State officials may not obstruct access to the courts and, absent a countervailing state interest of overriding significance, due process requires that prisoners be given a meaningful opportunity to be heard. In short, post-conviction proceedings must be more than a formality; and the State must insure that those who cannot help themselves have reasonably adequate assistance in preparing and filing post-conviction pleadings. *Johnson v. Avery,* 393 U.S. 483 (1969).

The court below carefully considered what is required to obtain a hearing on a post-conviction petition and found that California prisoners were effectively barred from the courts by the denial of legal resources essential to the presentation of their claims. It held that the State's asserted interest in standardization and economy was not sufficient to justify depriving state prisoners of a meaningful opportunity to be heard. However, the court did not order the State to provide "expensive law libraries" or appointed counsel for prisoners. It simply required the state officials to submit a plan for providing indigent prisoners with the legal assistance necessary to present arguably meritorious claims in a manner that avoids summary dismissal.

California imprisons only a small proportion of persons convicted of felonies. Since those who are not incarcerated are free to seek gainful employment and hire an attorney, or to make use of the other legal resources available in free society; and since some imprisoned felons have sufficient monetary resources to retain an attorney to counsel them, do their research and draft their petitions, the court below correctly held that California denies equal protection to indigent prisoners. This Court has consistently made plain that indigent prisoners cannot be deprived of meaningful and effective access to the courts by economic barriers, and this is true in post-conviction proceedings as well as on direct appeal. See, e.g., *Gardner v. California*, 393 U.S. 367 (1969).

Having found that indigent prisoners in California were being deprived of due process and equal protec-

tion of the laws by the State's refusal to provide legal resources essential for effective access to the courts, the court below properly directed the state officials to submit a plan that would assure such access. The State can comply with the district court's order by utilizing one or more of the easily available, relatively inexpensive techniques for providing prisoners with necessary assistance. Use of such techniques would not only assure prisoners effective access to the courts, but would lighten the burden on state and federal courts in processing their applications.

The Eleventh Amendment does not bar the relief ordered by the district court, because this Court has repeatedly made plain that, in enforcing the Fourteenth Amendment, the federal courts may grant injunctive relief having the effect of requiring states to expend public funds in order to bring public programs into compliance with constitutional guarantees.

ARGUMENT

I. INTRODUCTION

A. The Post-Conviction Plight of California Prisoners

Those confined to California state prisons face special difficulties with regard to their ability to obtain judicial relief from illegality in such confinement. Despite this Court's decision in *Douglas v. California*, 372 U.S. 353 (1963), California does not have any requirement, whether by statute, rule of court or judicial decision, that convicted criminal defendants be notified either of their right to appeal

or of their right to assigned counsel on appeal.[2] In these circumstances, it is not surprising that the proportion of criminal defendants who appeal from their convictions is very small. For the years 1964 through 1968, only 5% of defendants convicted of felonies in California appealed their convictions. California Department of Justice, Bureau of Criminal Statistics, *Criminal Appeals in California, 1964-1968*, p. 12. The range is from less than 1% of those who entered pleas of guilty to more than one-third of those convicted by juries. *Id.* Given the fact that so few defendants appeal and the fact that the State does not require notification of the right to appeal with assigned counsel, it must be assumed that at least some of those who do not appeal fail to do so because of ignorance of their rights.[3] It is not clear whether California law provides a remedy for a defendant who thus loses his right to appeal. See *Still v. Fitzharris*, 413 F.2d 977 (9th Cir. 1969).

Moreover, even where a defendant does succeed in filing notice of appeal, the State fails in many cases

---

[2] *Cf. United States ex rel. Smith v. McMann*, 417 F.2d 648 (2d Cir. 1969), where the Second Circuit *en banc* held that such a failure to provide procedures implementing *Douglas* violates defendants' constitutional rights.

Cal. Govt. Code Section 27706(a) (West Supp. 1971) defines the duty of the Public Defender in representing an indigent defendant. He is not required to prosecute an appeal to a higher court unless "in his opinion, the appeal will or might reasonably be expected to result in the reversal or modification of conviction." If he decides not to appeal, he has no obligation to file a notice of appeal, or to advise the defendant of his right to appeal or to obtain other counsel.

[3] *Cf. Swenson v. Bosler*, 386 U.S. 258, 260 (1967); *Goodwin v. Cardwell*, 432 F.2d 521 (6th Cir. 1971); *Nelson v. Peyton*, 415 F.2d 1154 (4th Cir. 1969); *Cruz v. Beto*, 391 F.2d 235 (5th Cir. 1968).

to provide for adequate representation by court-appointed counsel. The rate of compensation is extremely low and it is frequently impossible to obtain experienced counsel. A report of the California Judicial Council states that

> "Most of the volunteers are recent admittees of the bar with little or no experience in the field of criminal law. As a result, the quality of representation is uneven and sometimes inadequate. In testimony before a legislative committee it was estimated that 30 to 40 percent of the appeals filed for indigents in criminal cases fell 'below an acceptable level of quality.'" See Judicial Council of California, *1970 Annual Report to the Governor and the Legislature*, p. 16.

The inevitable consequence of the failure of the State to provide adequate machinery for resolving on direct appeal defendants' claims of error in criminal convictions or sentences is that many such claims, including federal constitutional claims, must be presented in post-conviction collateral proceedings such as coram nobis and habeas corpus. Of course, even where defendants were adequately represented on direct appeal, claims of error dehors the record necessarily must be raised in collateral proceedings. In short, there is a heavy burden on post-conviction proceedings in California. Convicted felons are frequently forced to resort to collateral proceedings in order to correct fundamental errors in their convictions or sentences.[4]

---

[4]See, e.g., *In re Williams*, 1 Cal.3d 168, 460 P.2d 984 (1969), where the indigent defendant who had been represented by the Public Defender and failed to file timely notice of appeal filed

The State of California imprisons only a small proportion of persons convicted of felonies.[5] The large number of convicted felons who are not in prison but who are placed on probation or who have been released on parole are free to seek gainful employment and to earn sufficient income to engage an attorney to represent them. They are also free to consult public law libraries at their leisure and to make use of whatever legal resources are available in the "free world," including legal services offices funded by the federal Office of Economic Opportunity. But the convicted felons whom California chooses to imprison are left virtually without any legal resources for preparing and conducting post-conviction collateral proceedings.

California has not adopted any of the techniques suggested by this Court in *Johnson v. Avery*, 393 U.S. 483 (1969), for providing legal assistance to prisoners

---

three post-conviction proceedings before he—and the California Supreme Court—realized he had pleaded guilty to a crime he did not commit. When the indigent defendants in *In re Smith*, 3 Cal. 3d 192, 474 P.2d 969 (1970), and *In re Greenfield*, 11 Cal.App.3d 536, 89 Cal.Rptr. 847 (1970), finally succeeded in having their convictions overturned via *in propria persona* applications, the courts deplored the inadequacy of their court-appointed counsel on direct appeal. In *Greenfield*, the court said, "A half hour of rudimentary research . . . would have revealed a defense crucial to petitioner's case." 11 Cal.App.3d 544. See also *In re Banks*, 4 Cal. 3d 337, ___ P. 2d ___ (1971).

[5]For example, in 1969, there were 50,568 persons charged with felonies who were convicted in California courts. Of this number, 19,470 (38.5%) were given probation, 13,718 (27.1%) were given probation and a jail term and 7,020 (13.9%) were sentenced to short terms in county jails. Only 4,940 (9.8%) were sentenced to prison. California Department of Justice, Bureau of Criminal Statistics, *Crime and Delinquency in California 1969*, pp. 33, 108.

Moreover, of the 34,851 persons who on December 31, 1969, were under the jurisdiction of the California Department of Corrections, 11,833 (33.9%) were at large on parole. Only 23,018 were imprisoned in penal institutions under the jurisdiction of the Department. *Id.* at p. 37.

in the preparation of their post-conviction pleadings: unlike many states, California makes no provision for representation by a public defender or legal aid society in any proceedings after direct appeal[6]; the State has not adopted a program for utilizing law students in interviewing and advising prison inmates; the State has not undertaken any program whereby members of any bar association visit prisons to consult with prisoners concerning their cases; and the State has not trained able and literate prisoners to render assistance to others. 393 U.S. at 489.[7]

The Department of Corrections does provide a few law books in each of its twelve institutions but, as the court below found, these "libraries" are grossly inadequate even for the limited purpose of researching claims to be presented in post-conviction criminal proceedings. Indeed, this lawsuit was precipitated by the promulgation of a new regulation (App. 41) purporting to "standardize" the list of law books permitted in California prisons, but providing for the confiscation of law books or materials not on the prescribed list—a veritable book burning that would

---

[6]A number of states have adopted working systems for appointed counsel in proceedings subsequent to appeal. See, e.g., *Ark. R. Crim. Pro.* 1D (Supp. 1969); *Ind. Rule P.C.* 1(I)(1) (Burns Spec. Supp. 1970); *Me. Rev. Stat. Ann.* tit. 14, § 5506 (1964); *Mo. Sup. Ct. R.* 27.26; *Mont. Rev. Code* § 95-1004 (1969 Rpl. Vol.); *N.C. Gen. Stat.* § 15-219 (Supp. 1969); *Ohio Rev. Code* §2953.24 (Page's Supp. 1970); *Ore. Rev. Stat.* § 138.590 (1969-70); *S.D. Sess. Laws* ch. 121, § 3 (1966); *Wyo. Stat. Ann.* § 7-408.4 (Supp. 1969).

[7]Indeed, California prohibited prisoners from helping each other with any legal work until after this Court's decision in *Johnson v. Avery.*

deprive California prisoners of a portion of the few legal materials they already have.

The action of the State of California and its Department of Corrections in incarcerating criminal defendants and then depriving them of the legal wherewithal for preparing and presenting constitutional claims to the courts takes its toll in swamping the courts, including the federal courts, with a continuing flood of *in propria persona* pleadings raising in piecemeal fashion the various claims that prisoners on their own can think of. As Chief Justice Burger has noted, prisoner reliance on federal courts to review state convictions and sentences produces not only a drain on the limited resources of the federal courts but also a strain on the relations between the parallel court systems. *Remarks on the State of the Federal Judiciary,* 56 A.B.A.J. 929 (1970). In fiscal year 1968-1969 alone, California prisoners filed 1,029 cases in the federal courts in California. *Annual Report of the Director of the Administrative Office of the United States Courts, 1969,* Table C3, p. 213. In the same fiscal year, they also filed 6,200 post-conviction petitions in the state courts of California. Judicial Council of California, *1971 Annual Report to the Governor and the Legislature,* 31. There is no way of knowing how many of the pleadings were frivolous or repetitious, or of knowing how much valuable time of judges and clerks was taken up in processing these applications. What is known is that a substantial amount of judicial time of both state and federal courts has been consumed in deciphering prisoner applications from California. It is not sur-

prising that many applications get short shrift and it is likely that many meritorious petitions are overlooked in the flood of frivolous ones. *Cf. Peters v. Rutledge,* 397 F.2d 731, 738 (5th Cir. 1968).

B. The Decision of the Court Below

The three-judge federal district court found that indigent prisoners in California were effectively denied access to the courts for the purpose of pursuing existing post-conviction remedies. The court carefully considered the State's argument that law "libraries" must be stringently limited in the interest of standardization and economy, and held that the paramount federal right of access to the courts must prevail. The court rejected the notion that an adequate opportunity for a prisoner to challenge his conviction or sentence in available state and federal forums is a "privilege" rather than a right and found unrealistic the State's argument that in post-conviction proceedings a prisoner requires no legal expertise and need only state the facts of his case in order to gain a judicial hearing. The court said that much more than recitation of simple "facts" is required to obtain relief by habeas corpus:

> "A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing. . . . 'Access to the courts,' then, is a larger concept than that put forward by the State. It encompasses all the means a defendant or petitioner might require to get fair

hearing from the judiciary on all charges brought against him or grievances alleged by him." 319 F.Supp. at 110 (App. 100).

It must be remembered that two of the three members of the court below are district judges who are confronted with California prisoner applications every day, and are intimately familiar with what it takes to get a judicial hearing in California.[8]

The court below held that by denying indigent prisoners the necessary legal resources to prepare an application for post-conviction relief, California effectively denied them access to the courts and equal protection of the laws. Contrary to the Attorney General's assertion in this Court, however, the district court did *not* order the state officials "to furnish prison inmates with extensive law libraries" or to provide prisoners with "professional or quasi-professional legal assistance." The court below specifically refrained from undertaking "the task of devising another system whereby indigent prisoners are given adequate means of obtaining the legal expertise necessary to obtain judicial consideration

---

[8]The California Supreme Court also disagrees with the Attorney General's argument that a prisoner need only state "facts" in order to obtain judicial relief. Thus,

> "This court has itself recognized that some kind of access to legal materials is necessary to the preparation of any effective application for relief. '[A]lthough [an application] should ordinarily be predicated on a full and honest statement of the *facts* which the inmate believes give rise to a remedy (*In re Chessman* (1955) 44 Cal.2d 1, 10 (278 P.2d 24); *In re Swain* (1949) 34 Cal.2d 300, 302, 304 (209 P.2d 793)), the relevance of certain facts may not be apparent to him until he has done some legal research on the point.' (*In re Schoengarth, supra*, 66 Cal.2d 295, 305)." *In re Harrell*, 2 Cal.3d 675, 695, 470 P.2d 640, 653 (1970).

of alleged grievances cognizable by the courts" (App. 104). The court noted that "the alternatives open to the state are legion," and listed a few of the means by which other states or prison systems have provided for the legal needs of their charges (App. 101). Instead of enjoining the California officials to provide a library, or appointed counsel, or some other specific means of ensuring that prisoners are not left legally destitute, the court below simply ordered the officials to file new regulations providing either for expanded law libraries or for "some new method of satisfying the legal needs" of California prisoners (App. 104-05).[9] Thus, the shape of the legal assistance program is to be decided by the State.[10] Rather than submitting a plan or new regulations to the court below, however, the state officials have appealed to this Court, contending in effect that they are not constitutionally required to provide any legal resources at all to indigent California prisoners.

---

[9]The court also enjoined the officials from destroying or removing law books and materials already available in California prisons (App. 105-06).

[10]As this Court has recently said with respect to the equity powers of federal courts where constitutional violations have been demonstrated,

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> • • •
>
> "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education*, ... U.S. ....., 91 S. Ct. 1267, 1276 (1971).

Here, the court below exercised its broad equity powers in the most restrained manner possible, by directing the state officials to develop their own appropriate methods rather than by mandating specific conduct or programs by the officials.

II. BY DEPRIVING INDIGENT PRISONERS OF NECESSARY LEGAL RESOURCES TO CHALLENGE THEIR CONVICTIONS OR SENTENCES CALIFORNIA EFFECTIVELY DENIES THEM ACCESS TO THE COURTS.

The constitutional prohibition against depriving a man of liberty without due process of law has, as a necessary corollary, the requirement that prisoners be afforded access to the courts to permit setting aside convictions obtained in violation of their federal constitutional rights. See, e.g., *Kaufman v. United States,* 394 U.S. 217, 226 (1969); *Johnson v. Avery,* 393 U.S. 483 (1969); *Mooney v. Holohan,* 294 U.S. 703, 713 (1935).

It has long been clear that the paramount interest in assuring prisoners access to the courts to present their federal claims invalidates prison regulations which effectively impair that right. *Ex parte Hull,* 312 U.S. 546 (1941). Not only may state officials not obstruct access to the courts, but "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut,* 401 U.S. ....., ..., 91 S.Ct. 780, 785 (1971). The Court in *Boddie,* relying on precedents established in the criminal defense context, held that due process of law prohibits a state from denying access to its courts to indigents seeking judicial dissolution of their marriage solely because of their inability to pay court fees and costs. The Court reasoned that where the "judicial proceeding becomes the only effective means

of resolving the dispute at hand . . . denial of a defendant's full access to that process raises grave problems for its legitimacy."[11]

In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court recognized that full access to the courts for many prisoners is meaningless unless some form of legal assistance is provided. The Court emphasized that "for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than a formality." 393 U.S. at 486. The Court held that unless "the state provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief" it may not bar inmates from furnishing assistance to other inmates. Mr. Justice White, dissenting, would not have struck down the anti-prisoner assistance regulation but would have ruled in a proper case that "the state must provide access to the courts by insuring that those who cannot help themselves have reasonably ade-

---

[11]The Court in *Boddie* found insufficient the state's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment, relying on *Griffin v. Illinois*, 351 U.S. 12 (1956). The state interest did not constitute a "sufficient countervailing justification" for denying the indigents an opportunity to be heard.

Mr. Justice Black, dissenting, distinguished civil lawsuits from criminal prosecutions, stating that "because of this great governmental power the United States Constitution has provided special protections for people charged with crime." But as to cases following *Boddie*, Mr. Justice Black has noted that "once the right to unhampered access to the judicial process has been established, that right is diluted unless the indigent litigant has an opportunity to assert and obtain review of the errors committed at trial. . . . [T]here cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel." *Meltzer v. G. Buck LeCraw & Co.*, 39 U.S.L.W. 3483, 3484 (May 3, 1971).

quate assistance in preparing their post-conviction papers." 393 U.S. at 502. This is precisely what the court below has required the California officials to do in the instant case. Indeed, Mr. Justice White's opinion in *Johnson* states what is basically at stake in the instant case:

> "The illiterate or poorly educated and inexperienced indigent cannot adequately help himself and . . . unless he secures aid from some other source he is effectively denied the opportunity to present to the courts what may be valid claims for post-conviction relief." 393 U.S. at 498.

This Court's decisions in *Boddie* and *Johnson,* and the earlier decisions in *Griffin v. Illinois,* 351 U.S. 12 (1956), and *Douglas v. California,* 372 U.S. 353 (1963), teach that the states cannot deny to indigents the necessary means for obtaining a fair hearing of their possibly valid constitutional claims. The Court's decisions have recognized practical reality not merely by striking down absolute barriers to the courts but by declaring that *effective* access to the judicial process is required where fundamental interests like liberty are at stake. For example, in *Douglas,* as here, the prisoner was not totally barred from filing his appeal; and in *Johnson,* as here, he was not totally barred from filing his writ. But in both cases, as here, the state practice prevented *effective* use of the judicial process. If a prisoner with a meritorious claim is unable to present it to the court in a way that avoids summary dismissal, he is denied access to the courts. Jailhouse lawyers were permitted by *Johnson*

because of the function they serve—as tools enabling prisoners to bring their claims before the courts. Mr. Justice White noted in *Johnson* that "unless the help the indigent gets from other inmates is reasonably adequate for the task, he will be as surely and effectively barred from the courts as if he were accorded no help at all." 393 U.S. at 499. As foreseen by Mr. Justice White, the district court in the present case found that other tools are needed as well.[12] Just as the paramount interest in making the courts fully available for the resolution of constitutional claims compelled the result in *Johnson*, it requires affirmance of the decision in the present case. Post-conviction remedies theoretically available to all in California are not in fact available if the State denies indigents the legal wherewithal to use them. Because the State denies the prisoner both his livelihood (e.g., to hire a lawyer) and his liberty (e.g., to use a public law library or consult an OEO legal services attorney), the State has erected very effective barriers to the judicial process—unless the State furnishes alternative sources of legal help.

In determining whether California denies imprisoned indigents effective access to the courts, consideration should be given to (1) the special significance of post-conviction proceedings for California

[12] The California Supreme Court has also recognized that *Johnson v. Avery* "heralds the advent of new principles governing the question of prisoner access to legal materials. . . . [W]e are cognizant that the principles of Johnson may, in a proper case, require a judicial assessment of the adequacy of prison libraries to permit legal research of a minimum degree of effectiveness." *In re Harrell*, 2 Cal.3d 675, 695, 470 P.2d 640, 653 (1970).

prisoners, (2) the legal resources required for prisoners to make effective use of such proceedings, and (3) the legal resources actually provided by the State.

1. Significance of California Post-Conviction Proceedings

As this Court noted with regard to federal collateral proceedings in *Kaufman v. United States*, 394 U.S. 217, 226 (1969), "adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." The need for post-conviction mechanisms for relief in California is especially strong because; as noted above,[13] the State has not provided procedures to implement the decision in *Douglas v. California*, 372 U.S. 353 (1963). Consequently, many convicted felons lose through inadvertence their right to appeal. They are, indeed, in precisely the same position as the would-be appellant in California before this Court's decision in *Douglas*—they are left to shift for themselves in identifying errors in their trial and making their initial presentation to the court.[14] See *Prison Writ Writing: Three Essays*, 56 Cal.L.Rev. 342, 363, 373 (1968); *Cf. Rodriguez v. United States*, 395 U.S. 327, 330 (1969). Without

[13] See pp. 7-8, *supra*.

[14] *Cf. United States ex rel. Smith v. McMann*, 417 F.2d 648, 658 (2d Cir. 1969), where Judge Friendly observed that "a state's duty may sometimes be so compelling that continued inaction can fairly be regarded as violating the Fourteenth Amendment." In *Wilson v. Wade*, 396 U.S. 282, 286 (1970), this Court left open the question whether there are any circumstances in which the Constitution requires the State to provide an indigent with a free transcript to aid him to prepare a petition for collateral relief.

some form of legal assistance, they will find themselves excluded "from the only forum effectively empowered to settle their disputes." *Boddie v. Connecticut*, 401 U.S. ....., ..., 91 S.Ct. 780, 785 (1971).

2. Necessary Assistance Required to Obtain A Fair Hearing on Post-Conviction Claims

The California Supreme Court has recognized that in a post-conviction proceeding, "the questions that may be raised . . . are as crucial as those that may be raised on direct appeal." *In re Shipman*, 62 Cal.2d 226, 231, 42 Cal.Rptr. 1, 4 (1965); *cf. Gardner v. California*, 393 U.S. 367, 370 (1969). Nevertheless, counsel is not appointed in such proceedings unless the petitioner makes "adequate factual allegations stating a prima facie case" for relief.[15] 62 Cal.2d at 232, 42 Cal.Rptr. at 5. Given the substantiality and the possible complexity as well as the variety of the issues that may be presented collaterally, it is very unlikely that the average prisoner is capable on his own of stating a prima facie case. The threshold problem for the prisoner is to ascertain whether state coram nobis or state habeas corpus procedures should be invoked.[16]

---

[15] *Amici* believe that the decision below can be affirmed without reaching, or even approaching, the question whether prisoners have a constitutional right to counsel in some or all post-conviction proceedings. *But see Mempa v. Rhay*, 389 U.S. 128, 134 (1967), where the Court analyzed prior right-to-counsel decisions that "clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." See also Note, *Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1202-05 (1970).

[16] A petition for a writ of error coram nobis (Cal. Penal Code, Section 1265), is properly filed in the court of conviction. The conditions for its issuance are (1) an error of fact existing at the

Where habeas corpus is appropriate, the petitioner has his choice of three state forums, the Superior Court, the Court of Appeal or the Supreme Court. California Penal Code, Sections 1475, 1508; Witkin, *Cal. Crim. Proc.* 764-65 (1963). All three courts have original habeas jurisdiction and it is not necessary to file first in a lower court. *Id.* In fiscal year 1968-69, about 6,200 post-conviction applications were filed, of which 3,814 were filed in Superior Court, 1,051 in the Court of Appeal and 1,345 in the Supreme Court. Judicial Council of California, *1970 Annual Report to the Governor and the Legislature,* 36. Of the approximately 6,200 applications, about 5,300 were

---

time of judgment; (2) the fact does not appear of record or go to the merits of the issues tried; (3) it was not presented at trial for excusable reasons; and (4) knowledge of the fact would have prevented rendition of the judgment. See *California Criminal Law Practice,* California Continuing Education of the Bar, 371-73 (1969). Habeas corpus, on the other hand, is applied for in the court having jurisdiction over the prison, and serves its traditional purpose of inquiring into the lawfulness of the conviction. As a practical matter, untutored prisoners experience difficulty in determining whether coram nobis or habeas corpus is the appropriate vehicle for raising the "factual issue" which they claim invalidates their conviction, and since mislabelling results in filing in the wrong court, an erroneously labelled claim is likely to be dismissed without explanation, regardless of its substantive merit.

For an extreme example of the difficulties encountered by prisoners in states which have not enacted modern post-conviction procedures, see *Marino v. Ragen,* 332 U.S. 561 (1947). Only a handful of states have done so. See generally, Note, *State Post-Conviction Remedies and Federal Habeas Corpus,* 12 William & Mary L.Rev. 149 (1970).

The Emory Law School Legal Assistance For Inmates Program found that some inmates did not even know in what court they had been convicted, and that many did not know the exact nature of the crime for which they were convicted, or the nature of the sentence imposed. See Jacob and Sharma, *Justice After Trial: Prisoners' Need For Legal Services In the Criminal-Correctional Process,* 18 Kan. L. Rev. 493, 621 n. 723 (1970). This is consistent with the experience of *amici* in attempting to assist California prison inmates.

denied without either a hearing or a written opinion. *Id.* at 31. Thus, the typical petitioner received only a postcard stating that his petition was summarily denied, with no clue as to the ground for denial. *Id.* at 34, 37. The typical state petitioner in California has no way of knowing whether he has been denied because of some techical defect in his application (e.g., incorrect venue), a failure to state some material fact, general incomprehensibility of the petition, or reliance on a legal theory rejected by cases or statutes he has never heard of.

The Attorney General asserts here, as he did below, that the petitioner need only state the "facts" of his case in order to obtain a judicial hearing. The court below, however, composed of judges who know what it takes to gain a post-conviction hearing in a busy trial court, exposed the utter unreality of the Attorney General's position (App. 100). Even assuming that the untutored prisoner can clear all the technical and jurisdictional hurdles, he must know *which* facts to present to the court. Even an educated layman is unlikely to be able to differentiate the legally relevant facts in his case. Left to his own resources, the prisoner is likely to omit essential facts, or to bury them in a mass of irrelevant detail.[17] This is particu-

[17] *Cf. United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 715 (2d Cir. 1960), where the issue was the need for counsel at a post-conviction hearing. The court said: ". . . rarely will a prisoner have sufficient ability or training to recognize the facts which are important to his case or present his side of the dispute in an orderly manner."

In *In re Williams*, 1 Cal.3d 168, 460 P.2d 984 (1969), the prisoner's third petition for habeas corpus was granted. His two unsuccessful petitions had been based on erroneous legal theories, and

larly true when the essential "fact" is not part of the criminal transaction itself, but rather concerns the constitutionality of the criminal statute, e.g., *Robinson v. California,* 370 U.S. 660 (1962), or the omission of a procedural protection essential to the integrity and reliability of the fact-finding process, e.g., *Pointer v. Texas,* 380 U.S. 400 (1965). In short, "it is necessary to understand what one's rights are before it is possible to set out in a petition the facts which support them. . . ." *Johnson v. Avery,* 393 U.S. 483, 501 (1969) (dissenting opinion of White, J.).

The Attorney General also suggests that the habeas corpus forms provided by federal and state courts are sufficient to enable the unassisted indigent prisoner to present an adequate claim for relief. The inadequacy of the forms for this purpose is discussed in the Annual Report of the Judicial Council of California (1971) at pages 46-47. The Report points out that the California form fails to give any guidance as to what possible grounds and what facts are required for relief, and notes that neither the relevant facts nor the theories are self-evident in any case. Moreover, reliance on forms as the exclusive means of providing access to the courts assumes that

---

the existence of a valid claim for relief was not uncovered until he was able to cite the governing case. In *In re Greenfield,* 11 Cal. App.3d 536, 89 Cal.Rptr. 847 (1970), a case in which the petitioner's right to relief turned on the same point of law, the court observed that, "No profession depends upon its books so deeply and vitally as the law. Only the smallest lawyer is too big to use law books." The need for including legal citations in prisoners' petitions is particularly acute because the judges of the rural Superior Courts in which most petitions are filed do not have the assistance of law clerks. See Krause, *A Lawyer Looks at Writ Writing,* 56 Cal. L. Rev. 371, 372 (1968).

prisoners will understand printed documents and instructions well enough to fill them out correctly. The invalidity of such an assumption is noted by the Report, and the general illiteracy, lack of education and intelligence in prisons have been noticed by this Court, *Johnson v. Avery,* 393 U.S. 483, 487 (1969), and documented by commentators. See Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 Kan.L.Rev. 493, 508 (1970). In short, the untutored and indigent prisoner, even the literate and intelligent one, without access to an adequate library or preliminary legal counselling, is not likely to be able to present a petition clearly setting forth a meritorious claim.

3. The Legal Resources Provided by the State

As noted above,[18] California does not authorize its public defenders to assist in the preparation of post-conviction proceedings. Nor does the State provide for court-appointed attorneys, bar associations or law students to furnish any pre-hearing assistance. California does permit jailhouse lawyers to help other prisoners. And the State does provide the few law books listed in the regulation (App. 41) invalidated by the court below. But that is all.

The Attorney General, instead of filing new regulations providing at least for an augmented library or "some new method" of meeting the legal needs of California prisoners (App. 104-05), has appealed to

[18]See pp. 10-11, *supra.*

this Court, taking the position that the State is not obligated to provide any legal assistance at all to indigent prisoners. As stated above, we believe this Court's decisions on effective access to the courts render the Attorney General's position completely untenable.

There are easily available, relatively inexpensive techniques for providing prisoners with the necessary legal advice and assistance for presenting valid claims. As this Court noted in *Johnson v. Avery*, 393 U.S. 483 (1969), some states make public defenders available to consult with prisoners regarding their habeas petitions. Others have created new post-conviction procedures which permit or require the appointment of private counsel.[19] Still others have developed programs to assist prisoners without the expenditure of public funds, by cooperative action with law schools or privately funded projects.[20] See generally, on the variety of prisoner legal aid programs, Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan.L.Rev. 493, 593-613 (1970).

Courts and commentators have often discussed the economy that can result from improved state post-

---

[19]See generally Note, *State Post-Conviction Remedies and Federal Habeas Corpus*, 12 William & Mary L.Rev. 149 (1970).

[20]At least one state—New York—has obtained federal funds for this purpose through a grant from the Law Enforcement Assistance Administration. See 5 Crim. L. Rptr. 2277-78 (1969). In 1971 alone, California received $32,999,000 of federal funds under the Omnibus Crime Control Act. *The Recorder*, June 11, 1971, at 1, col. 7. But such funds are apparently being devoted to other purposes.

conviction procedures. By reducing frivolous and repetitious petitions and eliminating the need for piecemeal litigation, assistance programs could effect a substantial saving in judicial time, and reduce the burden on the state agency charged with the duty of responding. See, e.g., *United States v. Simpson,* 436 F.2d 163 (D.C. Cir. 1970); Lay, *Problems of Federal Habeas Corpus Involving State Prisoners,* 45 F.R.D. 45, 49-51 (1968).[21]

The benefits of such programs are not merely speculative. Thus, the volume of state prisoner habeas petitions filed in the federal district court for Western Missouri *decreased* following a great improvement in the state's processing of post-conviction applications. See Oliver, *Postconviction Applications Viewed by a Federal Judge—Revisited,* 45 F.R.D. 199, 204 (1968).[22]

When prisoners are forced to prepare their post-conviction petitions without any form of expert as-

---

[21]As one commentator has observed, it is unfair to blame prisoner litigants for the great volume of totally unmeritorious petitions filed while simultaneously denying them the assistance they need to determine whether their petitions have merit or not. Krause, *A Lawyer Looks at Writ Writing,* 56 Cal. L.Rev. 371, 372 (1968).

[22]The outstanding features of the revised Missouri procedure are: (1) it provides for mandatory appointment of counsel if the petitioner's motion presents any question of law or issue of fact (regardless of whether a hearing is required); (2) counsel is required to seek out any unalleged grounds for attack and amend the complaint to include them; and (3) the trial court is required to make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. 45 F.R.D. at 211-13; Mo. Sup.Ct.R. 27.26(h)(i). In Illinois, post-conviction procedures require the public defender to consult with the prisoner, ascertain his claims, examine the record and amend his petition adequately to present any constitutional claims. See *People v. Lyons,* 46 Ill.2d 172, 263 N.E.2d 95 (1970).

sistance, the flood of meritless cases makes it likely that meritorious cases will be overlooked. See *Peters v. Rutledge,* 397 F.2d 731, 738 (5th Cir. 1968). Yet, where prisoners receive proper assistance that discourages frivolous claims and effectively presents meritorious ones, observers have been surprised by the number of valid claims which emerge. See Oliver, *Postconviction Applications Viewed by a Federal Judge—Revisited,* 45 F.R.D. 199, 217 (1968); Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 Kan.L.Rev. 493, 504 (1970).

In short, there are many techniques for providing the necessary legal resources to make effective use of existing post-conviction remedies. The Court need not choose among them. The district court has required the State officials themselves to develop appropriate legal assistance methods, and they should be free to experiment with whatever alternatives or combinations thereof are best suited to the California situation. But clearly, we submit, the district court was correct in finding that due process of law requires some form of state-provided assistance to California prisoners.

III. CALIFORNIA'S DENIAL OF NECESSARY LEGAL ASSISTANCE TO INDIGENT PRISONERS DEPRIVES THEM OF EQUAL PROTECTION OF THE LAWS.

The district court found not only that California denied indigent prisoners due process of law by depriving them of effective access to the courts, but

also that they were denied equal protection when compared with those convicts who are able to afford retained counsel.

This Court has consistently made plain that access to the courts by indigent prisoners for both appeals and post-conviction proceedings cannot be effectively denied by economic and other barriers. See *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to free transcript for appeal);[23] *Douglas v. California*, 372 U.S. 353 (1963) (right to assigned counsel on appeal);[24] *Lane v. Brown*, 372 U.S. 477 (1963) (indigent may not be barred from appealing denial of state coram nobis by requirement that public defender order transcript); *Burns v. Ohio*, 360 U.S. 252 (1959) (right to seek leave to appeal without paying filing fee);[25] *Smith v. Bennett*, 365 U.S. 708 (1961) (right to bring State

---

[23] "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19 (Black, J.). "The State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope." *Id.* at 24 (Frankfurter, J., concurring).

[24] "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." 372 U.S. at 357-58 (Douglas, J.).

[25] "[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." 360 U.S. at 257 (Warren, C. J.).

habeas corpus proceedings without paying fees);[26] *Long v. District Court,* 385 U.S. 192 (1966) (right to free transcript on appeal from State habeas corpus); *Draper v. Washington,* 372 U.S. 487 (1963) (evaluation of merits by trial judge cannot bar the full appellate review available to non-indigents); *Roberts v. LaVallee,* 389 U.S. 40 (1967) (right to free transcript of preliminary hearing);[27] *Rinaldi v. Yeager,* 384 U.S. 305 (1966) (state may not withhold prisoner's earnings to recoup cost of transcript furnished on appeal); *Anders v. California,* 386 U.S. 738 (1967) (right to assistance of appointed counsel acting as advocate);[28] *Entsminger v. Iowa,* 386 U.S. 748 (1967) (right to full record on appeal assuring complete and effective appellate review); *Gardner v. California,* 393 U.S. 367 (1969) (right to transcript of state habeas hearing); *Williams v. Oklahoma City,* 395 U.S. 458 (1969) (right to free transcript for appeal from conviction of petty offense).

Of course, this does not mean that the state must equalize litigation resources to place all potential claimants on the same footing. But unless the indi-

---

[26] "[T]o interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." 365 U.S. at 709 (Clark, J.).

[27] "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." 389 U.S. at 42 (per curiam).

[28] The procedure directed by the Court "will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those who are in a similar situation but who are able to afford the retention of private counsel." 386 U.S. at 745 (Clark, J.).

gent prisoner has legal assistance "reasonably adequate for the task" of presenting a valid post-conviction claim, he will be "surely and effectively barred from the courts," *Johnson v. Avery*, 393 U.S. 483, 499 (1969) (dissenting opinion of White, J.), and the remedy fully available to a prisoner with some money will be denied to the indigent.[29] Such denial of legal assistance minimally necessary to present a valid claim violates the equal protection clause.[30]

The Attorney General contends that the concept of the "affluent" convict is illusory, and thereby dismisses the district court's equal protection holding. But clearly there are *some* prisoners who can pay a retained attorney to counsel them, do their research and draft their petition. As long as there are *any* in this status, we submit, the State cannot—by imprisoning the others and assuring their continued impoverishment—make legal cripples of the indigent prisoners.

Furthermore, California prisoners are disadvantaged not only vis-a-vis their more fortunate fellows but also when compared to the many convicted felons given probation or on parole, who are free to earn enough money to pay a lawyer or consult an OEO legal services attorney or, if they choose, do their own research at available public libraries. Therefore, this case is much like the Court's decision in *Rinaldi v.*

---

[29]Of course, there is no rational basis for assuming that indigents' claims will be less meritorious than those of other prisoners. *Cf. Burns v. Ohio*, 360 U.S. 252, 257 (1959).

[30]See generally, Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 25-26 (1969).

Yeager, 384 U.S. 305 (1966). In *Rinaldi*, the Court invalidated a New Jersey practice of withholding prisoners' earnings to reimburse the state for transcripts previously provided. The Court pointed out that others convicted of the same crimes—but placed on probation, given a suspended sentence or a fine—were not subject to the same treatment. The Court held that the New Jersey procedure thus denied prisoners equal protection of the laws.

IV. THE ELEVENTH AMENDMENT DOES NOT BAR THE RELIEF ORDERED BY THE DISTRICT COURT.

The Attorney General asserts that the injunction of the court below is inconsistent with the Eleventh Amendment because it is, in effect, a "raid on the state treasury." This argument is a red herring.[31] The district court's injunction does not require the spending of a single dollar of state money. What it requires is that the defendant officials submit revised regulations providing for some plan of adequate legal assistance to prisoners. The Attorney General has not submitted any plan, but has instead appealed to this Court.

---

[31] The Attorney General also urges that the relief granted goes beyond the stipulation of the parties. This point hardly seems worthy of presenting to this Court. Rule 54(c) of the Federal Rules of Civil Procedure states that the judgment "shall grant the relief to which the party in whose favor it is rendered is entitled," even if not demanded in the pleadings. The court should be free to fashion an appropriate remedy that is not expressly excluded by or plainly inconsistent with the stipulation. The state officials will have ample opportunity to be heard on the question of relief when new regulations are filed in the district court.

We assume that regulations complying with the district court's order would likely result in the expenditure of additional state funds, although this is not necessarily so.[32] However, the same is true in practically any case enforcing Fourteenth Amendment obligations. A recent example is the decision in *Swann v. Charlotte-Mecklenburg Board of Education,* 401 U.S. ....., 91 S.Ct. 1267 (1971), where the Court approved a district court order requiring a substantial increase in the amount of busing required to meet constitutional standards of school integration. The Court noted that the school system would have to employ 138 more buses than it had previously operated. *Id.* at 1283, n.12. There are numerous other cases, involving a range of Fourteenth Amendment issues, where the Court has indirectly required the states to expend public funds in order to bring public programs into compliance with constitutional guarantees. See, e.g., *Goldberg v. Kelly,* 397 U.S. 254 (1970) (hearings for welfare recipients); *Turner v. Fouche,* 396 U.S. 346 (1970) (reconstitution of jury lists); *Reynolds v. Sims,* 377 U.S. 533 (1964) (reapportionment of legislative districts).

The Attorney General acknowledges that this Court has effectively ordered the disbursement of state funds in a number of cases (brief for appellants, p. 35). Most closely in point are the decisions in *Griffin v. Illinois,* 351 U.S. 12 (1956), and *Douglas v. California,* 372 U.S. 353 (1963), where the Court in

---

[32]See page 26, *supra,* describing alternatives for providing minimal preliminary legal assistance to prisoners from private or federal sources not requiring the expenditure of state funds.

effect required the states to spend money in order to comply with constitutional guarantees in the criminal process. The Attorney General purports to distinguish these cases, however, on the ground that "this was done on direct review of criminal convictions in state courts." This distinction is untenable. We cannot believe that the results in *Griffin* and *Douglas* or any other case where this Court has granted relief resulting in the expenditure of state funds would be any different if the case had been brought (like the present case) as an affirmative civil suit to invalidate a state statute or regulation on constitutional grounds. The Eleventh Amendment does not stand in the way of enforcing the Fourteenth.

CONCLUSION

For the reasons stated, the decision below should be in all respects affirmed.

Dated, June 17, 1971.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
STANLEY A. BASS
ANTHONY G. AMSTERDAM
WILLIAM BENNETT TURNER
OSCAR WILLIAMS
ALICE DANIEL
Attorneys for Amici Curiae.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 2 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-9

No. ~~582~~

THOMAS C. LYNCH, ET AL.,

Appellants,

v.

ROBERT O. GILMORE, JR., ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES

JOHN ESHLEMAN WAHL, Esq.
MARSHALL W. KRAUSE, Esq.
1255 Post Street, Suite 1128
San Francisco, California 94109
Telephone: (415) 771-5950
Attorneys for Appellees

TABLE OF CONTENTS

	Page
Regulations Involved	1
Question Presented	6
Statement of the Case	6
Summary of Argument	8
Argument	11
I. This Court has jurisdiction to hear the instant appeal	11
A. The jurisdiction of the three-judge court is res judicata	11
B. Only a three-judge court had jurisdiction to consider the injunctive relief which was requested, and to grant the relief which was granted. A single judge would have been without jurisdiction	12
C. A three-judge District Court would not have been required if the attack on the prison-lawbook regulations did not involve one or more substantial questions of constitutional law. The attack on the prison-lawbook regulations did involve substantial questions of federal constitutional law	14
D. The requirement of 28 U.S.C. § 2281 for the convening of a three-judge court is not waivable by defendant State officers	18
II. The Constitution does compel a state to insure that an indigent prison inmate have the opportunity to use the research tools that are necessary for effective access to the courts	19
III. The relief granted by the District Court was not limited by the scope of relief suggested in the Stipulation of the parties	27
IV. The Eleventh Amendment does not bar the issuance of the "ORDER GRANTING RELIEF" from which the appellants appeal	28
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Alabama Public Service Comm'n v. Southern R. Co., 341 U.S. 341 (1951) 12

Anders v. California, 386 U.S. 738 (1967) 17

Burns v. Ohio, 360 U.S. 252 (1959) 17

California Water Service Co. v. City of Redding, 304 U.S. 252 (1938) 14, 17, 18, 19

Cochran v. Kansas, 316 U.S. 255 (1942) 17

Conway v. California Adult Authority, 396 U.S. 107 (1969), *reh. denied* 396 U.S. 1030 (1970) 21

Douglas v. California, 372 U.S. 353 (1963) 10, 17, 23

Dyer v. Rich, 259 F. Supp. 736 (N.D. Miss. Greenville Div. 1966) 19

Entsminger v. Iowa, 386 U.S. 748 (1967) 17

Ex parte Hull, 312 U.S. 546 (1941) 16

Ex parte Poresky, 290 U.S. 30 (1933) 14, 17, 18, 19

Ex parte Young, 209 U.S. 123 (1908) 30

Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945) 29

Gardner v. California, 393 U.S. 367 (1969) 18

Gilmore v. Lynch, 400 F.2d 228 (9th Cir. 1968), *cert. denied* 393 U.S. 1092 (1969) 8

Gilmore v. Lynch, 319 F. Supp. 105 (1970) ("ORDER GRANTING RELIEF") 11

Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) 30

Griffin v. Illinois, 351 U.S. 12 (1956) 10, 17, 23, 30

Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961) 12

In re Chessman, 44 Cal. 2d 1 (1955) 25

In re Harrell, 2 Cal. 3d 675 (1970) 25

In re Schoengarth, 66 Cal. 2d 295 (1967) 25

In re Smith, 3 Cal.3d 192 (1970) 22

In re Swain, 34 Cal. 2d 300 (1949) 25
Johnson v. Avery, 393 U.S. 483 (1969) 10, 15, 16, 22, 25
Lane v. Brown, 372 U.S. 477 (1963) 17
Long v. District Court, 385 U.S. 192 (1966) 18
McCormick & Co. v. Brown, 52 F.2d 934 (4th Cir. 1931), *affirmed* 286 U.S. 131 (1932) 12. 13
Moody v. Flowers, 387 U.S. 97 (1967) 18
Mora v. Mejias, 206 F.2d 377 (1st Cir. 1953) 12
Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923) 12. 13
O'Malley v. United States, 128 F.2d 676 (8th Cir. 1942), reversed on other grounds *sub nomine* Pendergast v. United States, 317 U.S. 412 (1942) 19
Pendergast v. United States, 317 U.S. 412 (1942) 19
Roberts v. LaVallee, Warden, 389 U.S. 40 (1967) 17
Smith v. Bennett, 365 U.S. 708 (1961) 18
Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930) 18
Swenson, Warden v. Bosler, 386 U.S. 258 (1967) 17
Swift & Co. v. Wickham, 230 F. Supp. 393 (S.D. N.Y. 1964), *appeal dismissed* 382 U.S. 111 (1965) 19
White v. Ragen, 324 U.S. 760 (1945) 16
Williams v. Oklahoma City, 395 U.S. 458 (1969) 17

Constitutional Sections:

United States Constitution, Eleventh Amendment 10, 29, 30, 31
United States Constitution, Fourteenth Amendment 9, 31

Statutes, Rules and Regulations:

28 U.S.C. § 1292(b) 7, 11
28 U.S.C. § 2281 .....11, 12, 13, 18
42 U.S.C. §§ 1983-86 (Civil Rights Act of 1871) 17, 26, 30
Fed. R. Civ. P. 42 7
Fed. R. Civ. P. 54(c) 27
California Penal Code §§ 5050, 5054, 5058 13

California Department of Corrections Administrative Manual, Paragraphs 330.041-330.043 ..... 1, 2, 6, 12

California Department of Corrections Transmittal Letter 26/66 ..... 2, 6, 28

California Department of Corrections Director's Rules Paragraphs D2601-D2602 3

California State Law Library "Information for Prison Librarians" 3

Other Authorities:

Krause, A Lawyer Looks at Writ Writing, 56 Cal. L. Rev. 371 (1968) 22

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 582

THOMAS C. LYNCH, ET AL.,

Appellants,

v.

ROBERT O. GILMORE, JR., ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES

REGULATIONS INVOLVED

Appellees do not agree with appellants in the citation of the regulations involved; appellees cite the following regulations:

(1) California Department of Corrections Administrative Manual Paragraphs 330.041, 330.042, and 330.043 provide:

"330.041

There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

1. The California Penal Code
2. The California Welfare and Institutions Code
3. The California Health and Safety Code
4. The California Vehicle Code
5. The United States and California Constitutions
6. A recognized law dictionary (such as Black's)
7. Witkin's California Criminal Procedures (Bender Moss Co.)
8. Subscription to California Weekly Digest
9. California Rules of Court
10. Rules of the United States Court of Appeals (Ninth Circuit)
11. Rules of United States Supreme Court"

"330.042

Sufficient copies will be maintained to provide reasonable access on not less than a weekly basis."

"330.043

All State owned law books and references will be maintained in a suitable place and no State owned books or references are to be removed from the designated 'law library', except to administrative segregation units as scheduled."

(App. 41-42, 93 n. 2)

(2) California Director of Corrections Transmittal Letter 26/66, dated September 19, 1966, directed to:

"Wardens and Superintendents, Deputy Director, Correctional Conservation Camp Services Division; Chief, Parole and Community Services Division; and Staff Members"

which provides, *inter alia*, on the first page of the letter, in promulgating Administrative Manual Paragraph 330.041, set forth above:

"Paragraph 330.04, Law Books and References, is added to specify a uniform list of law books and references to be made available in each institution. These books are to be obtained from existing funds and all existing law books and references in inmate law libraries not consistent with this section are to be removed and destroyed."

(3) California Department of Corrections Director's Rules Paragraphs D2601 and D2602 provide:

"D2601

LAW BOOKS. The use of institution law books by inmates is a privilege which may be withdrawn upon misuse. State-owned law books are not to be removed from the designated place of study. Personally-owned law books shall be limited by local regulations to the availability of space for personal property in the inmate's quarters. Law books in excess of this limitation may be donated to the library, sent home, or destroyed, whichever the inmate prefers."

"D2602

INMATE ASSISTANCE. One inmate may assist another inmate in the preparation of legal documents, but may not receive remuneration therefor. Remuneration is not limited to present benefits, but includes future as well as past benefits. A room or rooms may be designated by the Warden or Superintendent for this purpose. All briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain."

(App. 44-45)

(4) The California State Law Library "INFORMATION FOR PRISON LIBRARIANS" provides:

"California State Library
Law Library
Library and Courts Bldg.
Sacramento, California 95809

"INFORMATION FOR PRISON LIBRARIANS

"The following sets *only* are available for circulation to prison inmates:

Title	*Abbreviation*
California Appellate Reports	CA
California Appellate Reports, 2d Series	CA 2d
California Reports	C
California Reports, 2d Series	C 2d
California Reporter	C Rptr
Pacific Reporter	P
Pacific Reporter, 2d Series	P 2d
Federal Reporter	F
Federal Reporter, 2d Series	F 2d
Federal Rules Decisions	FRD
Federal Supplement	F Supp
United States Reports	US
Supreme Court Reporter	SCt
U.S. Supreme Court Reports, Lawyers Edition	L Ed
Lawyers Edition, 2d Series	L Ed 2d
California Statutes and Amendments to the Codes	Cal Stats

Note: SCt, US, and L Ed contain the same cases. C & CA cases are found in P until 1960. After 1960 C cases are found in C Rptr and P, CA in C Rptr.

"We return cards for several reasons:

Out in circulation—Either out circulating or a duplicate request: we do not reserve books for inmates.

Not in State Library—Incomplete set for prison circulation. (See attached page for listing of missing volumes)

Return for more complete information—Incorrect citation or insufficient information.

Not for circulation—Does not circulate to inmates: requests for staff should be marked "Staff" with name.

Your cooperation and assistance will help us give the best possible service with limited staff and time.

Please: Do not request anything not listed above, except for 'Staff'.

Do not send in more than 5 requests per man each week; or more than one request for a particular volume: we only have one copy.

Mark volume number and abbreviation of title in the upper left-hand box marked 'Call number', with one card for each volume.

Sort cards by report title and volume number, from low to high.

Send in all your requests together once a week.

Thank you

"Volumes lacking from prison library collection
July 1967

Title	*Volumes Missing*
CA	29, 103
CA 2d	45, 112
C	29, 49, 61, 74, 83, 101, 152
C 2d	5, 6, 28, 44, 52, 55, 58, 62
C Rptr	5, 8, 14, 26
P	58, 202, 209, 210
P 2d	284, 371, 382, 400
F 2d	43, 152, 156, 310, 343
FRD	3, 33, 34, 35
F Supp	53, 246
US	1-4, 17-18, 23-24, 66, 68, 83, 114, 168, 188, 190-192, 194-195, 197-201, 203-204, 228-259, 262-263, 265-283, 287, 308-309, 323, 328, 338, 346, 354, 356-357, 359-360, 371, 378, 380
S Ct	1-7, 14-36, 39-41, 47, 52, 65, 73, 78, 79, 81, 81A, 82, 82A, 84, 84A
L Ed	27-82, 84, 86, 96
L Ed 2d	2, 6, 10"

(App. 49-51)

QUESTION PRESENTED

The California Attorney General, for the appellants, has alleged that the question presented is as follows:

> "Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries, or, alternatively, provide inmates with professional or quasi-professional legal assistance?"

Appellees respectfully submit that the question alleged by appellants is not presented by the opinion below. If the opinion raises a question for argument, it is *whether the state has a federal constitutional duty to provide indigent prison inmates access to a minimum amount of legal research materials necessary to insure that these indigent inmates have effective access to the courts, and access essentially equal in effectiveness to the access to the courts enjoyed by affluent inmates.*

STATEMENT OF THE CASE

Over four years ago, on September 19, 1966, the Director of Corrections of the State of California, promulgated Department of Corrections Transmittal Letter 26/66. The regulations promulgated by this letter included what is now California Department of Corrections Administrative Manual Paragraph 330.041, which forbade any California prison or penal institution from having any other than twelve named law books in the prison library. Books and opinions in excess of those allowed were to be removed and destroyed. Claimed purposes of these regulations (as stated in the District Court in the defendants' Notice of Motion and Motion to Strike Prayer for Damages, to Dismiss, and for Summary Judgment (R. 196)) were to preclude inmate practice of law for favors and to discourage inmate requests for transfers to institutions with larger law libraries.

Other claimed purposes (as stated in the District Court in the defendants' Memorandum of Law upon Issues Submitted to the Three-Judge Court by Stipulation filed Feb-

ruary 9, 1970) were to "equalize the opportunities available to all inmates, in whatever institution they were incarcerated, to have access to legal materials." The "equalization" attempted called for *removing* legal research materials so that no inmate could have access to more materials than any other.

Four inmate complaints, seeking, *inter alia*, relief from enforcement of these regulations, were filed by three inmates of San Quentin Prison including inmate Robert O. Gilmore, Jr., and one inmate of Folsom Prison. Inmate Gilmore's complaint contained the signatures of 88 other San Quentin inmates, as co-plaintiffs (R. 1).

The District Court, on January 10, 1967, granted permission to filed *in forma pauperis*, and consolidated the four cases according to Fed. R. Civ. P. 42, because they contained common questions of law and fact. In the same order the District Court, "because these actions raise important questions in the access of prisoners to the courts," appointed counsel for the plaintiffs (R. 70).

Appointed counsel filed a motion for preliminary injunction and an amended complaint (App. 11-25), which attacked the above-mentioned prison regulations concerning the contents of prison libraries, as well as, and in conjunction with, the State Law Library regulations limiting the lawbooks available to inmates, and the prison regulations restricting inmates from giving or receiving legal assistance to or from other inmates.

Plaintiffs moved for the convening of a three-judge District Court under Title 28, United States Code, section 1292(b). (App. 26-27). On appeal the order denying the motion was reversed, and a three-judge District Court was ordered convened. Defendants petitioned for Writ of Certiorari for a review of the reversal, but this Court, after requesting opposition to the petition, denied the petition for Writ of Certiorari. 393 U.S. 1092 (1969).

Plaintiffs and defendants filed a "Stipulation of Settled Statement of Issues" on February 9, 1970, which comprises

all the issues in the case which were properly presented to a three-judge District Court, and not to a single judge, or a single judge and jury. (App. 33-91). Briefs were filed and oral argument was heard.

The American Civil Liberties Union of Northern California was given leave to enter an appearance as *amicus curide*, and filed a brief in the District Court in support of plaintiffs' position on the said "Stipulation of Settled Statement of Issues."

On May 28, 1970, the three-judge District Court filed their decision, dated May 26, 1970, entitled "ORDER GRANTING RELIEF." (App. 92-106; 319 F. Supp. 105). It is that decision which is before this Court on this appeal, and it is that decision which we here defend.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Ninth Circuit is a final judgment on the question of the jurisdiction of the three-judge District Court in this case. Although the appellants in this case (defendants below) petitioned for certiorari and review of the decision of the Ninth Circuit, certiorari was denied by this Court, after asking for, and receiving, opposition to the petition for certiorari. (See No. 626, October Term, 1968. *Gilmore v. Lynch*, 400 F.2d 228 (9th Cir. 1968), *cert. denied* 393 U.S. 1092 (1969).)

Convening a three-judge District Court was required by statute in order to grant the relief contained in the order which is here appealed from. The defendant State officers *could not waive the statutory requirement for the three-judge* District Court, because a single judge would have been without jurisdiction to grant the relief which was granted.

A three-judge District Court must be convened when an injunction is sought against a state's administrative regula-

tion, having statewide application, on grounds raising substantial questions of federal constitutional law. Substantial questions are those which are not obviously without merit, or not clearly foreclosed by previous decisions of this Court. In view of the serious consideration given by the courts below to the questions presented by the plaintiffs (appellees here), it cannot be said that these questions are obviously without merit. This Court has not rendered any decisions which clearly decide the issues raised by the plaintiffs in the District Court. Accordingly, a three-judge court was required to consider the injunctive relief sought by the plaintiffs.

The court below ordered the defendant State officers to amend their regulations dealing with lawbooks in the prisons, so that inmates would not be restricted to only the twelve legal references allowed by the regulations. The court ordered amendments which would insure that inmates would have the opportunity to use the legal research "tools" which are required for meaningful access to the courts. The Fourteenth Amendment compels the relief granted.

The Fourteenth Amendment compels a state not to deprive indigent prison inmates of opportunity to have access to the courts which is equal to the opportunity had by affluent prison inmates. Access to the courts is a fundamental element of due process of law. Access to the courts is meaningless without the "tools"—legal research materials or counsel—which make it effective. Ineffective access is not real access to the courts. The prison inmate who can hire counsel, or buy lawbooks, has better protection of law than the indigent inmate who cannot hire counsel or buy lawbooks, and who is left to the eleven named lawbooks to which California's prison libraries are restricted.

Although the California Attorney General argues that lawbooks and counsel are unnecessary for effective access to the courts in post-conviction remedy proceedings, it is clear, and the District Court judicially noticed, that real

access to the courts means that prison inmates must have an opportunity to have assistance—either counsel or research materials—so that their petitions and complaints "will in fact be fully considered by the courts" (App. 101). The blank forms which California provides to prisoners for habeas corpus petitions, are not guarantees of effective access to the courts.

The relief ordered by the District Court is squarely in line with the indigent-appellant equal protection decisions (*e.g., Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956)), and with the deference for the security of the Great Writ contained in *Johnson v. Avery*, 393 U.S. 483 (1969).

The relief granted by the District Court was within the total scope of relief asked for by the plaintiffs (appellees here), and is permitted by the Federal Rules of Civil Procedure even had it not been requested in the pleadings. The Stipulation of Settled Statement of Issues suggested relief which might be granted by the court below, on a given finding, but the suggested relief was not binding on the court.

The Eleventh Amendment does not bar the relief granted, which enforces rights granted by the, later, Fourteenth Amendment. State officers may be sued to enforce rights granted by the Fourteenth Amendment without violating the sovereign's immunity and notwithstanding the fact that the judicial enforcement of such rights may have the eventual effect of requiring an expenditure of state moneys. But, even so, in this case there is no evidence in the record which would show that an additional State legislative appropriation would be necessary to comply with the order of the District Court.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THE INSTANT APPEAL

A. The Jurisdiction of the Three-Judge Court Is Res Judicata

We, appellees here and plaintiffs below, most strongly join in the arguments made by the appellants (defendants below) on the issue of *res judicata*.

On *March 14, 1967*, plaintiffs filed a motion for preliminary injunction and a motion for the convening of a three-judge district court pursuant to Title 28, United States Code, section 2281. The motion for the convening of the three-judge court was denied on July 6, 1967, but plaintiffs were allowed to take an appeal of the denial pursuant to Title 28, United States Code, section 1292(b).

The United States Court of Appeals for the Ninth Circuit, on August 16, 1968, reversed the order denying the motion for the convening of a three-judge court, and ordered "further proceedings looking toward the convening of a three-judge court." *Gilmore v. Lynch*, 400 F.2d 228, 231 (1968).

Defendants, now the appellants in this Court, then petitioned this Court for writ of certiorari to review the decision of the Court of Appeals. We, the plaintiffs below and now the appellees here, did not at first file any document opposing the petition for certiorari. *But this Court requested that we file written opposition*, and we thereupon filed a brief in opposition to the granting of the petition for writ of certiorari. That brief should be part of the Court's records under No. 626, October Term, 1968.

Accordingly, the question of jurisdiction of the three-judge court has been before this Court, and this Court considered it important enough to request that written opposition to the petition for certiorari be submitted. Such opposition was submitted. The petition for certiorari was

denied. Accordingly, the judgment ordering the convening of a three-judge court is a final judgment in this case.

B. Only a Three-Judge Court Had Jurisdiction To Consider the Injunctive Relief Which Was Requested, and To Grant the Relief Which Was Granted. A Single Judge Would Have Been Without Jurisdiction.

Title 28, United States Code, section 2281, provides that an injunction restraining the enforcement of an order made by an administrative board or commission acting under state statutes, shall not be granted by any district court upon the ground of unconstitutionality unless the application for the injunction is heard by a three-judge court.

Whenever there is an attack on constitutional grounds in federal court on a state administrative order, promulgated pursuant to authority granted by statute, section 2281 applies if the order is of general, statewide application. *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290 (1923); *Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953); *McCormick & Co. v. Brown*, 52 F.2d 934 (4th Cir. 1931), *affirmed* 286 U.S. 131 (1932).

Under such circumstances section 2281 applies even if the constitutionality of the statute, which creates the authority to make the order, is not attacked. *Oklahoma Natural Gas Co. v. Russell, supra.*

In *Hatfield v. Bailleaux*, 290 F.2d 632, 635 (9th Cir. 1961), which was a case dealing with prison regulations pertaining to lawbooks, the Court of Appeals for the Ninth Circuit said:

> "Where the effort is to enjoin the enforcement, operation or execution of an administrative order of general application representing considered state policy, an attack on the constitutionality of such an order calls section 2281 into play." (Citing, *inter alia* in footnote 4, *Alabama Public Service Commission v. Southern R. Co.*, 341 U.S. 341, 343 note 3

(1951), and *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 292 (1923).)

The *Hatfield* court went on to hold that there was no requirement for a three-judge court because

> "the orders [there] challenged, while promulgated pursuant to authority confessed by statute, [were] not of general state-wide application and [did] not represent state policy." 290 F.2d at 635.

The order, in this case, consists of prison regulations promulgated by the California Difector of Corrections, a single individual. "A single individual . . . may constitute a state administrative board or commission within the meaning of the act [28 U.S.C. § 2281]." *McCormick & Co. v. Brown*, 52 F.2d 934, 937 (4th Cir. 1931), *affirmed* 286 U.S. 131 (1932).

In this case the prison-lawbook regulations promulgated by the California Director of Corrections have general, statewide application; they apply to all of California's prisons. And they are promulgated pursuant to authority granted by statute. See California Penal Code, sections 5050, 5054, 5058.[1] The appellants have argued below that the prison-lawbook regulations were "quasi-legislative" in nature. (This characterization was made in the course of an attempt to argue that the Director of Corrections was immune from liability for promulgating the lawbook regulations.[2]) Certainly the prison-lawbook regulations comprise

---

[1]Cal. Penal Code § 5050 provides: "The office of Director of Corrections is hereby created."

Cal. Penal Code § 5054 provides: "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director."

Cal. Penal Code § 5058 provides: "*The director may prescribe rules and regulations for the administration of the prisons and may change them at his pleasure.*" (Emphasis added.)

[2]This argument may be found in the defendants' Notice of Motion and Motion to Strike Prayer for Damages, to Dismiss and for Summary Judgment, filed in the District Court (R. 206).

the considered legislative policy of the State of California. A three-judge district court is, accordingly, required to enjoin the enforcement of such regulations on the ground that they are unconstitutional.

C. A Three-Judge District Court Would Not Have Been Required if the Attack on the Prison-Lawbook Regulations Did Not Involve One or More Substantial Questions of Constitutional Law. The Attack on the Prison-Lawbook Regulations Did Involve Substantial Questions of Federal Constitutional Law.

Notwithstanding the requirements of Title 28, U.S. Code, section 2281, this Court has held that it is not necessary to convene a three-judge district court when an application is made to enjoin the enforcement of a state statute or a state administrative order promulgated pursuant to statute, if the application for injunctive relief does not raise a substantial federal constitutional question. *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938); *Ex parte Poresky*, 290 U.S. 30 (1933). In *California Water Service Co.* the Court has supplied criteria to be applied in determining whether a substantial constitutional question is raised: In order to be *a substantial* constitutional question the constitutional question must meet two requirements: (A) It must not be obviously without merit. (B) It must not be clearly unsound measured by *previous decisions of the Supreme Court.*

The constitutional questions raised in this case obviously cannot be attacked on the basis of failure to meet criterion (A) stated above. In view of the decision of the Court of Appeals for the Ninth Circuit, directing the convening of a three-judge district court (400 F.2d 228), and in view of the decision of that three-judge District Court, which is here appealed from, it cannot be said that the constitutional questions raised by appellees (plaintiffs below) are "obviously without merit."

Neither are the constitutional questions concerning access to the courts, raised by appellees (plaintiffs below), clearly unsound as measured by any previous decisions of the Supreme Court. There are none which are decisive in the case at bar on the constitutional questions concerning access to the courts. Second, previous decisions of the Supreme Court do not decide the constitutional questions of denial of equal protection of the laws to indigent prisoners, which questions are raised in our application for injunctive relief.

In the court below, plaintiffs and defendants filed a Stipulation of Settled Statement of Issues for decision by the three-judge district court. In that Stipulation the following five issues were presented:

> "1. Are the present State-wide rules and regulations of the California Department of Corrections, governing access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments, and pleadings, an unconstitutional infringement on prisoner access to the courts in so far as these rules and regulations affect indigent State prisoners?
>
> "2. Are the present State-wide rules and regulations of the California Department of Corrections, governing access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments, and pleadings, an unconstitutional deprivation of equal protection of the laws in so far as these rules and regulations affect indigent State prisoners?
>
> "3. Are the present State-wide rules and regulations, governing legal assistance, given by one State prisoner to another in California penal institutions, a violation of the rule of *Johnson v. Avery*, 393 U.S. 483 (1969)?
>
> "4. Are the present State-wide rules and regulations governing access by prisoners in California penal institutions to books in the State law library, an unconstitutional deprivation of access to the courts

in so far as these rules and regulations affect indigent State prisoners?

"5. Are the present State-wide rules and regulations governing access by prisoners in California penal institutions to books in the State law library, an unconstitutional deprivation of the rights of indigent prisoners to equal protection of the laws?"

Until *Johnson v. Avery*, 393 U.S. 483 (1969), the Supreme Court had not spoken for 27 years on the question of the definition of access to the courts for indigent inmates submitting personally drawn documents to the courts. In 1941 the Court decided *Ex parte Hull*, 312 U.S. 546, wherein the Court held invalid a prison regulation which prohibited the sending of legal petitions to courts unless the petitions were approved by the warden. *Id.* at 549. In a footnote to *White v. Ragen*, 324 U.S. 760 (1945), the Court referred to *Hull* in taking incidental note of unspecified practices of an Illinois warden which "denied the rights of prisoners to access to the courts . . . ." *Id.* at 762, fn. 1. In *Johnson v Avery, supra*, the Court held invalid a prison rule prohibiting inmates from assisting other inmates in preparing legal petitions. In the absence of *some other effective means of assistance* such a rule infringed upon the right of access to the courts. 393 U.S. 486-87.

Aside from *Hull's* limited ruling on submission of petitions to courts, and *Avery's* limited ruling on inmate assistance to other inmates in preparation of legal petitions, the Supreme Court has not spoken on the issue of just what access to the courts, for indigent inmates, means and includes. The question of whether the indigent inmate's right of access to the courts includes the right to obtain and use lawbooks, without a warden's approval, has not been touched upon even by implication. Certainly then, the constitutional questions raised by the plaintiffs below, concerning access to the courts, are not clearly unsound as having been settled "*from the previous decisions of [the*

Supreme] Court [so] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Ex parte Poresky, supra,* at 32; *California Water Service Co. v. City of Redding, supra,* at 255. (Emphasis added.)

It is obvious that an indigent inmate has no funds with which to hire an attorney. The complained of regulations were found by the court below to interfere with or cut off the indigent inmate's access to the courts. A rich inmate could obtain effective access to the courts notwithstanding the regulations, since the rich inmate could hire an attorney who could do legal research and obtain the process of the courts to enforce the rights of the rich inmate who hired him. But the indigent inmate is critically affected by the complained of regulations; they make his access to the courts ineffective access at best.

The Supreme Court has not spoken on the issues of denial of equal protection which are raised here. The plaintiffs below have raised issues of denial of equal protection by the regulations complained of. This Court has extensively defined the right of indigent defendants to equal protection *during trial and the process of appellate review.* See *Williams v. Oklahoma City,* 395 U.S. 458 (1969); *Roberts v. LaVallee, Warden,* 389 U.S. 40 (1967); *Entsminger v. Iowa,* 386 U.S. 748 (1967); *Anders v. California,* 386 U.S. 738 (1967); *Swenson, Warden v. Bosler,* 386 U.S. 258 (1967); *Lane v. Brown,* 372 U.S. 477 (1963); *Douglas v. California,* 372 U.S. 353 (1963); *Burns v. Ohio,* 360 U.S. 252 (1959); *Griffin v. Illinois,* 351 U.S. 12 (1956); *Cochran v. Kansas,* 316 U.S. 255 (1942). Although these cases are extensive in their definition of rights of the indigent, these cases do not deal with such post-conviction remedy proceedings as petitions for writs of habeas corpus and actions under the Civil Rights Act of 1871 (Title 42, United States Code, sections 1983-86). With regard to the right of the indigent habeas corpus petitioner to equal protection, this Court appears only to have touched on the transcript and

filing fee aspects of the indigent's disadvantage. See *Gardner v. California*, 393 U.S. 367 (1969); *Long v. District Court*, 385 U.S. 192 (1966); *Smith v. Bennett*, 365 U.S. 708 (1961). The Supreme Court has not decided the constitutional questions involving equal protection which the plaintiffs raised below. Therefore these constitutional questions are not foreclosed by previous Supreme Court decision. Therefore, these constitutional questions are *substantial* questions according to the standards established in *California Water Service Co. v. City of Redding*, *supra*, and *Ex parte Poresky*, *supra*.

D. The Requirement of 28 U.S.C. § 2281 for the Convening of a Three-Judge Court Is Not Waivable by Defendant State Officers

As we pointed out when this case was previously before this Court on the issue of convening of a three-judge court, the language of Title 28, U.S. Code, section 2281 appears to be jurisdictional. This Court so held in *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930). The statute declares that a requested injunction, restraining the enforcement of state statutes or administrative orders pursuant to the authority granted by state statutes, "shall not be granted . . . unless the application therefor is heard and determined by a district court of three judges . . . ."

Defendant State officers certainly are not prejudiced by not being allowed to waive the three-judge court requirement. In the first place it is the plaintiffs, not the defendant State officers, who have been severely prejudiced in this action. If there had been no litigation concerning the convening of the three-judge court, this matter would have been decided, in the District Court, on the merits well over three years ago.

Not allowing the defendant State officers to waive the jurisdictional requirement of the statute does not prejudice any right of appeal of defendant State officers. This court expressly made provision in *Moody v. Flowers*, 387 U.S. 97, 101-02 (1967), for an appeal to the Court of Appeals when a case reached this Court, coming from an improperly con-

vened three-judge district court. This Court made express provision for an appeal to the Court of Appeals even if the time had passed for the taking of an appeal to the Court of Appeals. If a three-judge district court is improperly convened it has been held that the three-judge court will be treated as merely having acted as a normal district court wherein three judges, instead of one, are sitting. *O'Malley v. United States*, 128 F.2d 676, 687 (8th Cir. 1942), reversed on other grounds *sub nomine Pendergast v. United States*, 317 U.S. 412 (1942); *Dyer v. Rich*, 259 F. Supp. 736 (N.D. Miss., Greenville Div. 1966); *Swift & Co. v. Wickham*, 230 F. Supp. 393, 410 (S.D. N.Y. 1964), *appeal dismissed* 382 U.S. 111 (1965).

Certainly the convening of a three-judge district court in this case will not serve as a precedent which will cause any rash of convenings of three-judge courts, because the test of substantiality of constitutional question, in accordance with the standards set forth in *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938), and *Ex parte Poresky*, 290 U.S. 30 (1933), will serve as an adequate barrier to the convening of a three-judge court when the question involved is sham and frivolous.

II. THE CONSTITUTION DOES COMPEL A STATE TO INSURE THAT AN INDIGENT PRISON INMATE HAVE THE OPPORTUNITY TO USE THE RESEARCH TOOLS THAT ARE NECESSARY FOR EFFECTIVE ACCESS TO THE COURTS

As stated above, the question presented by the judgment of the court below is not the question alleged by the State officials who are here appealing. The question presented, first, is restricted to the effect of the State prison regulations upon *indigent* prisoners, not prisoners in general. Second, the judgment below requires that *some* action be taken to insure that indigent inmates have the same opportunity to utilize the minimum amount of legal research materials necessary to insure an access to the courts that is

essentially equal to the access to the courts enjoyed by affluent inmates.

If someone trained in the law is available to assist, counsel and advise an inmate, the inmate can obtain access to legal research materials through this second party, and under such circumstances it might not be necessary for a state to provide access to legal research materials for indigent prisoners. But some means of providing access to legal research materials is essential if indigents, who cannot retain counsel, are to have access enjoyed by the affluent who can retain counsel.

Without access to legal research materials an inmate may never be able to have, for example, a potentially meritorious habeas corpus petition considered by the courts, because he may not know what facts are legally significant; he may not know what facts constitute grounds for issuance of a Writ of Habeas Corpus. If he is unable to find out what is the legal significance of the factual background of his case he is effectively deprived of the right to petition for the Great Writ.

The California Attorney General argues that "prison inmates are ill-equipped . . . to utilize . . . the arcane tools of the lawyer's trade." (Appts. Br. 7). At another point he states "simply that the assistance of counsel is not a necessary part of the concept of access to the courts . . . ." (Apnts. Br. 25). But this latter statement is made shortly after the Attorney General has argued that "since [the indigent inmate] has access to "jailhouse lawyers" to assist him, [*inter alia*] he has no constitutional right to post appellate assistance of counsel at state expense." (Apnts. Br. 25).

First the Attorney General says, inmates should not be allowed to use lawbooks because lawbooks are some kind of mysterious, even "arcane," amulets, charged with a potency of power which only the initiated (lawyers) should be allowed to exercise. But then the Attorney General says that lawyers are "not a necessary part of the concept of access to the courts," and he further embellishes this dis-

cussion of the role, or non-role, of lawbooks and legal materials in the concept of access to the courts, with the statement that because the indigent inmate has access to "jailhouse lawyers" to assist him, he therefore has no need, or constitutional right, to the assistance of lawyers in pursuing his post-conviction remedies.

The primary reason, the Attorney General gives, for the alleged non-necessity for assistance of counsel, or access to legal research materials, in post-conviction remedy proceedings, is that the State has provided some blank forms for inmates to use in preparing habeas corpus petitions. These blank forms are apparently supposed to serve as a complete, adequate, and effective substitute for the assistance of counsel, or access to legal research materials. The Attorney General's argument really boils down to the proposition that knowing the law, or having the opportunity to know it, is not necessary for effective access to the courts. This, we submit, is just not true.

The California Attorney General attempts to buttress his argument, that the legally ignorant, indigent inmate has as effective access to the courts as the affluent inmate who can hire a battery of lawyers, with statements that (1) it has been "our experience . . . that prisoners have little difficulty ascertaining [the facts which should be put in a habeas corpus petition to make it effective]," and that (2) "the habeas petition, in its early stages, should not be tested in the crucible of an adversary proceeding . . . . The attorney for the respondent may, and commonly does, point out authority tending to show that a given petition does not state grounds for relief [but] his role in this regard is primarily to assist the court." (Apnts. Br. 22-23). We submit that the Attorney General is attempting to "assist the court" in purely an adversary way when he "commonly" files a brief opposing the granting of relief.[3]

[3]In *Conway v. California Adult Authority*, 396 U.S. 107 (1969), *reh. denied* 396 U.S. 1030 (1970), this Court had granted certiorari to review a denial of a petition for writ of habeas corpus. However, when the briefs were filed on the merits, the California Attorney Gen-

Of course the habeas corpus petition begins an adversary proceeding, and of course it is an adversary proceeding *from start to finish.* Appellants have patently mis-stated the role of the State's attorneys, in practice, in post-conviction remedy proceedings. The role of the Deputies Attorney General, in practice at least, is to obtain dismissal, on any and every ground possible, of the petition for a writ of habeas corpus.[4] And what is the Attorney General's alle-

---

eral, respondent, alleged facts which showed that the issue for which certiorari had been granted did not exist. The writ of certiorari was dismissed as having been improvidently granted. In the opinion dismissing the writ this Court noted that the "imposition on this Court [was] revealed only at this late stage [as] the result of the policy of the Attorney General of California, as explained in the Respondents' brief, to make no response to habeas corpus petitions of state prisoners unless the court in which a petition is filed requests a response, as for example . . . by issuing an order to show cause why the writ should not be granted." 396 U.S. at 110. How does this policy of the Attorney General "assist the court" in which the petition is first filed, and so make the petitioner's need for legal research materials nonexistent? Even if the Attorney General's response to a petition were to be completely impartial and non-adversary, it could not possibly help the petitioner at the earliest, most vital stage when he is attempting to avoid summary dismissal of an arguably meritorious claim, since no response is filed at this stage.

In California the judges to whom petitions are normally first presented, the judges of the Superior Courts, do not have lawclerks. See Krause, *A Lawyer Looks at Writ Writing*, 56 Cal.L.Rev. 371, 372 (1968). Accordingly, it is not feasible for these judges to exhaustively and carefully review the legal significance of every petition. It is clear that "the initial burden of presenting a claim to post-conviction relief usually *rests upon the indigent prisoner himself with such help as he can obtain within the prison walls or the prison system.* In the case of all except those who are able to help themselves–usually a few old hands or exceptionally gifted prisoners–*the prisioners is, in effect, denied access to the courts unless such help is available.*" *Johnson v. Avery*, 393 U.S. 483, 488 (1969). (Emphasis added.)

[4]In *In re Smith*, 3 Cal.3d 192 (1970), the petitioner had alleged inadequate assistance of counsel on appeal, but the California Attorney General had responded arguing that no prejudice resulted even if assistance of counsel had been inadequate, because the Attorney General had himself raised and discussed one of petitioner's potential

gation of "our experience" concerning the alleged "little difficulty" of prisoners in ascertaining the facts necessary to state an effective petition for a writ of habeas corpus? Is the Attorney General alleging new facts dehors the record? Whatever is this vague "experience" of the counsel for the appellants, it is not the law, or any constitutional reason for a finding that the blank forms provided in the prisons make lawbooks unnecessary for effective access to the courts.

The Attorney General argues that the odds are against the average prisoner mastering lawbooks, and therefore he should not be exposed to them. Should the odds against the indigent prisoner keep him from the opportunity to ascertain the law, when his liberty or life may be at stake?

The appellants, besides arguing that knowing the law, or having the opportunity to know it, is not necessary for effective access to the courts, also argue that the great line of equal protection decisions which this Court has brought forth for indigent state criminal defendants and appellants, are not "realistic," and have "not proved entirely workable." (Apnts. Br. 27). We submit that whether the California Attorney General thinks those decisions (*e.g., Douglas v. California*, 372 U.S. 353 (1963), and *Griffin v. Illinois*, 351 U.S. 12 (1956)) are realistic or not, they are well-established and an essential part of our constitutional law. To go back to the unequal protection situation which existed before these decisions, would be a move which would only be recommended by State officials who are so

---

claims even though petitioner's counsel had not raised it. The Supreme Court of California rejected such an argument, saying that because the claim was discussed in a "unilateral presentation [in the Attorney General's] brief does not indicate that the court necessarily would have [decided against petitioner] if the point had been adversitively argued by petitioner's counsel. Adoption of the Attorney General's view would dilute the importance of the appellate counsel in the protection of the rights of criminal defendants . . . ." 3 Cal.3d at 203.

short-sighted that they are more interested in balance-sheets and non-disturbance of the tranquil operation of State offices, than they are interested in equal justice and constitutional guarantees which mean what they say.

Equal protection of the laws is one of the most sacred rights we have. This government, and perhaps our whole system of government; is under attack from many quarters, in ways and to degrees which we have not fully experienced before. But it will not be additional penal legislation or a larger F.B.I., or larger police forces that will be the ultimate deciding factor of whether our system of government survives. It will be, and it is, whether we pass the spiritual test of whether or not what we have is worth saving. What we have is not worth saving if there is only a lip-service paid to what are supposed to be our most sacred and valued rights, when we find it inconvenient, for dollar or operational difficulty reasons, to assure these rights to the lowest class in society. Such hypocrisy is a fungus which can fatally attack the roots of our national being.

If one inmate can obtain a reversal of an improper conviction because he has the money, or credit, to hire a lawyer who can use lawbooks, then another inmate should be able to use the same lawbooks. He should not be denied the lawbooks, and consequent relief, just because he has no money or credit.

In the United States, every man has the right to equal access to the courts. Money, or credit, was not written into the Constitution as a criterion of degree of effectiveness of access to the courts. If James Hoffa can pursue all the post-conviction remedies he has pursued, then Robert O. Gilmore, Jr., a pauper, should at least have the opportunity to use the same "tools" which Hoffa's lawyers have used for him, and which, as the court below judicially noticed, are really and in fact essential to effective access to the courts on post-conviction remedy proceedings. Would Sam Sheppard of Ohio have been released without the assistance of someone who knew the law? Would he

have been released merely by filling out California's blank forms?

The decision of the District Court in this case is in harmony with two late leading cases in the area of federal constitutional rights of prisoners: *Johnson v. Avery*, 393 U.S. 483 (1969), and *In re Harrell*, 2 Cal. 3d 675 (1970). In *Avery* this Court stressed that "there is no higher duty than to maintain [the writ of habeas corpus] unimpaired," and that "[s]ince the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." 393 U.S. at 485.

In *Harrell* the California Supreme Court commented on the question of adequacy of prison law libraries, as follows:

> "We cannot fail to recognize, however, that the decision of the United States Supreme Court in *Johnson v. Avery* heralds the advent of new principles governing the question of prisoner access to legal materials. Our recognition of this fact is concretized in preceding pages of this opinion wherein we have attempted to develop a flexible standard governing restrictions upon the right of mutual prisoner assistance. Moreover, we are cognizant that the principle of *Johnson* may, in a proper case, require a judicial assessment of the adequacy of prison libraries to permit legal research of a certain minimum degree of effectiveness. *This court has itself recognized that some kind of access to legal materials is necessary to the preparation of any effective application for relief.* '[A]lthough [an application] should ordinarily be predicated on a full and honest statement of the *facts* (*In re Chessman* (1955) 44 Cal. 2d 1, 10 [279 P.2d 24], *In re Swain* (1949) 34 Cal. 2d 300, 302, 304 [209 P.2d 793]), the relevance of certain facts may not be apparent to him until he has done some legal research on the point.' (*In re Schoengarth, supra*, 66 Cal. 2d 295, 305.)" 2 Cal. 3d at 695. (Emphasis added.)

In view of the inadequacy of the record before it in *Harrell*, and in view of the fact that the instant case was pending in the District Court, the California Supreme Court declined to rule on the adequacy of the State's prisons' libraries. 2 Cal. 3d at 695-96.

In commenting on earlier decisions which stood for the proposition that State prison inmates "have no legally enforceable rights to engage in legal research except insofar as such research is necessary to insure access to the courts," the California Supreme Court, in *Harrell*, noted that "that standard . . . conceptually begs the question asked of it . . . ." 2 Cal. 3d at 695.

It is beyond need for further argument that some knowledge of the law is required to effectively state facts sufficient to comprise a habeas corpus petition which is meritorious on its face; it is also beyond argument that some knowledge of the law is required in order to state a claim, meritorious on its face, in an action under the provisions of Title 42, United States Code sections 1983-86 (Civil Rights Act of 1871). Since some knowledge of the law is required to effectively have such proceedings considered by the courts, the State, in governing its prisons, must insure that indigent inmates will have access to the minimum amount of legal research materials necessary to obtain and use the legal knowledge required. The State must afford indigent inmates a sufficient opportunity to use legal research "tools," so that they have the opportunity to obtain access to the courts which is equal in effectiveness to the access enjoyed by affluent inmates who can hire counsel to find and use these "tools" for them. This was the rule stated and applied by the District Court in the decision below. We respectfully submit that this rule is sound, and is compelled by our Constitution.

III. THE RELIEF GRANTED BY THE DISTRICT COURT WAS NOT LIMITED BY THE SCOPE OF RELIEF SUGGESTED IN THE STIPULATION OF THE PARTIES

In the "STIPULATION OF SETTLED STATEMENT OF ISSUES" (App. 33-91), appellants and appellees (defendants and plaintiffs below) stipulated that all motions which had theretofore been filed, should be considered as filed as part of the settled statement of issues. The parties further stipulated that the three-judge court, which had theretofore been convened in this matter, "*may* decide all such motions heretofore filed in this matter on the basis of the settled statement of issues." (Emphasis added.) The Stipulation was not binding on the court below, and it is not binding on this Court. It bound only the parties, and it was for the purpose of assisting the Court in deciding what the issues were, in an attempt to simplify and condense a great number of pleadings and motions.

After a statement of the issues (of which there were five), the parties stated that they "further stipulate and agree that *the following relief may be granted by the Court, if it please the Court,* if the Court decides the issues above-stated, in the manner indicated." (Emphasis added.) It is quite clear that the relief was, from the very language of the Stipulation, only suggested relief. The court below, itself, never stated that it would be bound by the relief suggested in the Stipulation. There was no official order, of any kind, of the court below, attached to the Stipulation. And the relief which *was* granted by the court below in the "ORDER GRANTING RELIEF" (App. 92-106) falls within the scope of the relief prayed for by the appellees (plaintiffs below) in their various motions for preliminary injunction, and amendments to such motions, and in their amended complaint.

Further, F. R. Civ. P. 54(c) provides that a party shall be granted whatever relief the party is entitled to, in a judgment, even if the party has not demanded that relief in his pleadings.

Appellants argue that the only issues relevant to the instant appeal are Issues Nos. 1 and 2 in the said Stipulation. This is, incidentally, not the case, since the District Court framed its "ORDER GRANTING RELIEF" in such a way as to dispose of *all* the issues presented in the said Stipulation. In order to fully understand the order of the District Court insofar as it affects Issues Nos. 1 and 2, it is necessary to understand the interrelation of all of the issues, and the way the order affected, and was affected by, the other three Issues. The order here appeared from is clearly within the total scope of relief asked for, and is clearly within the discretion of a court of equity.

IV. THE ELEVENTH AMENDMENT DOES NOT BAR THE ISSUANCE OF THE "ORDER GRANTING RELIEF" FROM WHICH THE APPELLANTS APPEAL

The first premise of the California Attorney General is that additional lawbooks, provided for the prisoners, would require specific additional appropriations of the California Legislature therefor. But this is a statement of fact which is far outside the record here on appeal, and which is also questionable. Did the California Legislature pass a specific appropriation for the additional lawbooks required for the prisons when the Director of Corrections issued his original administrative order providing for the twelve expressly-named legal references for the library of each penal institution? When Department of Corrections Transmittal Letter 26/66 was issued, it ordered that prison libraries have only the twelve named legal references. Prison libraries which had additional references had to remove and dispose of them. Prison libraries which did not have the references had to obtain them. Never before, in all the litigation having to do with this case, has there been any reference to specific appropriations measures to buy the additional lawbooks which might be needed. It would appear that the Department of Corrections has discretionary power over the way part, or all, of its appropriations are spent. Accord-

ingly, a specific appropriations measure would not necessarily be required for the implementation of the "ORDER GRANTING RELIEF."

This action sounds in equity. It is obvious that a court of equity will not require a party to perform that which is impossible. If the defendant State officers are unable to provide additional lawbooks without express appropriations, then the Attorney General should have made appropriate representations to the court below. The court below did not order the defendants to go out and buy any specific lawbooks, or to go out and hire any lawyers; the court below simply ordered the defendants to file, with it, "new or amended regulations which accord with the principles expressed" in the decision of that court. (App. 105). The court below further indicated that it would review the proposed new regulations, and would have a full and fair hearing thereon if requested. It is hardly fitting for the Attorney General to now complain, in this Court, that he and his clients cannot comply with the order of the court below for reason of impossibility. Such a reason must ultimately be based on facts, and those facts are properly presented to the District Court, and not to this Court.

The Attorney General cites *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), as alleged authority for the proposition that the Eleventh Amendment bars the relief granted by the District Court in this case. But *Ford Motor Co.* is certainly not authority for such a proposition. *Ford Motor Co.* was a suit by a corporation *for a refund of taxes paid* to the State of Indiana. The plaintiff corporation had sued the State's Treasury, in effect, following the provisions of Indiana law concerning claims for refunds. In deciding the case this Court said that "where relief is sought *under general law* for wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally." 323 U.S. at 462. (Emphasis added.)

Ford Motor Co. was not an action filed under the provisions of the Civil Rights Act of 1871 (Title 42, United States Code, sections 1983, 1985), but the case at bar is such an action. The "ORDER GRANTING RELIEF" is not an adjudication that the State's Treasury owes anyone any money. In *Ford Motor Co.*, the plaintiff corporation was asking for just such an adjudication.

The Attorney General attempts to distinguish *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964), by saying that was an action against a county, and county officials only. But in that case this Court said, "it has been settled law since *Ex parte Young*, 209 U.S. 123 (1908), that suits against *state and* county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment." 377 U.S. at 228. (Emphasis added.)

(The California Attorney General attempts to distinguish the effects of such decisions as *Griffin v. Illinois, supra,* and *Douglas v. California, supra,* from the decision below in this case, on the basis that those cases were direct review of criminal convictions. The Attorney General distinguishes the present case because it is a civil action. He apparently argues that the federal courts cannot grant relief requiring State expenditures in a civil action, but they can grant relief, which has the effect of requiring State expenditures, in criminal actions, or in proceedings on petitions for writs of habeas corpus (and presumably petitions for writs of error coram nobis, etc.). Even if such a distinction were valid, and controlling, which is not the case, the case at bar should not be considered as a run-of-the-mill "civil" action. This action was brought, first, *in propria persona,* by indigent inmates for the purpose of protecting and securing their rights to pursue post-conviction remedies which include petitions for writs of habeas corpus. Perhaps such an action as this one is somewhat of a hybrid, but in any event equity looks to substance, and not to form, and basing a denial of relief in an action such as this one, on a dessicated categorization of forms of action, would be

the kind of tragic legal action which led, in old England, to the development of the Chancellor's court, because of the limited and stultifying scope of the forms of action at law.)

If there is any conflict between the Eleventh Amendment and attempts, such as in the case at bar, to enforce rights assured by the Fourteenth Amendment, the Eleventh Amendment must yield, since the Fourteenth Amendment is the more recent Amendment.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court has jurisdiction to hear the instant appeal, and the order of the District Court appealed from should be affirmed.

JOHN ESHLEMAN WAHL
MARSHALL W. KRAUSE
1255 Post Street
San Francisco, California 94109
Attorneys for Appellees

June 20, 1971

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 70-9

EVELLE J. YOUNGER, et al., *Appellants,*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR THE APPELLANTS

EVELLE J. YOUNGER,
Attorney General of the State of California,
EDWARD P. O'BRIEN,
Deputy Attorney General,
ROBERT R. GRANUCCI,
Deputy Attorney General,
GEORGE R. NOCK,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-3335,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO. SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Appellants' reply argument	1
I	
The Constitution imposes no duty upon state prison officials to furnish inmates with extensive law libraries or the services of lawyers or law students for the preparation of post-conviction petitions or Civil Rights Act complaints	1
II	
The order of the District Court is barred by the Eleventh Amendment	12
Conclusion	14

Table of Authorities Cited

Cases	Pages
Boddie v. Connecticut, 401 U.S. 371 (1971)	2, 3
Brine v. State, 160 Me. 401, 205 A.2d 12 (1964)	11
Douglas v. California, 372 U.S. 353 (1963)	6, 13
Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459	13
Goldberg v. Kelly, 397 U.S. 254 (1970)	12
Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964)	12
Griffin v. Illinois, 351 U.S. 12 (1956)	13
In re Tucker, 5 Cal.3d 171, 486 P.2d 657 (1971)	10
Johnson v. Avery, 393 U.S. 483 (1969)	8
Meltzer v. C. Buck Le Craw & Co., 402 U.S. 954 (1971)	3
People v. Acosta, 71 Cal.2d 683, 456 P.2d 136 (1969)	2
People v. Shipman, 62 Cal.2d 226, 397 P.2d 993 (1965)	4

Pages

Reynolds v. Sims, 377 U.S. 533 (1964) 12

Still v. Fitzharris, 413 F.2d 977 (9th Cir. 1969) 2

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 12

Turner v. Fouche, 396 U.S. 346 (1970) 12

United States v. Simpson, 436 F.2d 163 (D.C. Cir. 1970) 7

Constitutions

United States Constitution:

Eleventh Amendment 12, 13

Fourteenth Amendment 5, 14

Statutes

Me. Rev. Stat. Ann. tit. 14, § 5506 (1965) 11

Me. Rev. Stat. Ann. tit. 14, § 5507 (1965) 11

Uniform Post-Conviction Procedure Act, 9 U.L.A. 541 ..... 10, 11

46 J.S.B. Cal. 530 (1971) 2

Lawyers at Lineups (1969) 17 U.C.L.A. L.Rev. 339, 377 ... 10

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 70-9

EVELLE J. YOUNGER, et al., *Appellants,*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR THE APPELLANTS

APPELLANTS' REPLY ARGUMENT

I

THE CONSTITUTION IMPOSES NO DUTY UPON STATE PRISON OFFICIALS TO FURNISH INMATES WITH EXTENSIVE LAW LIBRARIES OR THE SERVICES OF LAWYERS OR LAW STUDENTS FOR THE PREPARATION OF POST-CONVICTION PETITIONS OR CIVIL RIGHTS ACT COMPLAINTS.

In an attempt to magnify the importance of post-conviction proceedings in California, amici curiae begin their argument with the misleading representation that California's convicted felons are not advised of

their right to appeal their convictions, and to do so at state expense. This representation is followed by an assertion that the right to appeal is commonly lost through the defendant's ignorance.

Although at present there is no requirement for advising a convicted defendant of his appeal rights, no rights are lost by virtue of the absence of such a requirement. Contrary to the representation of amici (Brief for Amici Curiae 8), California law allows relief from late filing of notice of appeal upon manifold grounds, including the defendant's ignorance of his appeal rights. *People v. Acosta,* 71 Cal.2d 683, 456 P. 2d 136 (1969). (This case was decided two months after *Still v. Fitzharris,* 413 F.2d 977 (9th Cir. 1969), cited by amici.) And when notice of appeal has been filed and the trial record reaches the appellate court, the clerk of that court uniformly notifies the appellant of his right to appointed counsel if indigent.

For what it may be worth, we note that the Judicial Council of the State of California has recognized the possibility of more direct ways to avoid loss of the right to appeal through ignorance, and has proposed amendments to the California Rules of Court which would require trial judges, upon imposition of judgment, to advise convicted defendants of their right to appeal at public expense. *See* 46 J.S.B. Cal. 530-31, 536-37 (1971).

In arguing that the failure of the state to provide inmates with large law libraries or alternative legal services denies them access to the courts, amici place primary reliance on *Boddie v. Connecticut,* 401 U.S.

371 (1971). This decision, we submit, offers no support at all for the contention of amici. In the *Boddie* opinion, this Court characterized the rights complained of by appellants therein as the rights of "access to the courts" (401 U.S. at 372, 374, 375, 376) and a "meaningful opportunity to be heard" (*Id.* at 377, 378, 379). Those rights were held to be denied by a requirement that indigents pay filing fees in order to secure a divorce. Nothing in the opinion mentions the assistance of counsel (or use of lawbooks) as necessary to vindicate these rights. Rather, the denial of the rights of "access to the courts" and a "meaningful opportunity to be heard" was found to lie in the fact that the state rules precluded inmates from getting into court. By implicitly defining "access to the courts" as the right to get into court, this Court, it would appear, has implicitly adopted our position that the state's duty toward its indigents to grant them access to the courts consists only in removing barriers between indigent and court. Since the only claimed restriction which appellants herein were found to place in the way of "access to the courts" lies in the state's alleged failure to provide means for improving the quality of inmate legal pleadings, there has been no infringement of the right of "access to the courts" as that concept was treated in *Boddie*.

Amici also rely upon an out-of-context quotation from an opinion by Mr. Justice Black, dissenting from denial of review in *Meltzer v. G. Buck LeCraw & Co.*, 402 U.S. 954 (1971): "[T]here cannot be meaningful access to the judicial process until every serious liti-

gant is represented by competent counsel." *Id.* at 959. But Mr. Justice Black went on to say, immediately thereafter, "Of course, not every litigant would be entitled to appointed counsel no matter how frivolous his claims might be." *Id.* We submit that the California procedure, whereby counsel is appointed when a prison inmate seeking post-conviction relief has presented a prima facie case for relief, *People v. Shipman,* 62 Cal.2d 226, 397 P.2d 993 (1965), gives expression to Mr. Justice Black's view of the Constitution by weeding out frivolous petitions and appointing counsel in cases which may have some merit.

The equal protection arguments advanced by amici constitute a veritable school of red herring. It is first argued that indigent prison inmates are denied equal protection vis-a-vis those convicted of felonies but placed on probation. The latter are stated to have the opportunity to earn money with which to hire attorneys, and the ability to use public law libraries. This is true, but irrelevant. For probationers rarely take advantage of these opportunities collaterally to attack their convictions. Prison walls seem to provide an impetus for convicted felons to file actions for post-conviction relief not present in their counterparts on conditional liberty. We can recall only two cases in which a felony probationer has instituted proceedings collaterally attacking his conviction, and one of those cases involved a judge who had been convicted of felony and who thus had an unusual interest in overturning his conviction. Undoubtedly, there have been other cases, but we submit that it is a proper subject

for judicial notice that such cases represent at most an insignificant fraction of post-conviction proceedings.

We are indebted to amici for the reductio ad absurdum of the equal protection doctrine—that as long as there exists *any* state prison inmate (italics amici's) who has the financial resources to retain an attorney to prepare a post-conviction petition, the state must provide attorneys for all indigent inmates. Brief for Amici Curiae 31.

According to the arguments of both amici and appellees, the achievements or good fortune of the few are the standard up to which, to achieve equal protection, the many must be brought in their dealings with the state. Precisely the same reasoning would dictate that the state furnish legislative lobbyists and special pleaders before the executive branch of government for anyone who desires but cannot afford them, since such lobbyists and pleaders are employed by large corporations, powerful associations, and wealthy individuals.

The argument is a sham. Any workable view of the Fourteenth Amendment requires, as a condition precedent to a finding of denial of equal protection, a clear showing that a group of citizens is, by reason of poverty or otherwise, disadvantaged in its relations with the state vis-a-vis a distinct and substantial minority (or majority) of its fellow citizens. No such showing is made by hypothecating the existence of a few affluent individuals and arguing that their indigent counterparts must be given, at public expense,

equivalent advantages. As noted in our earlier Brief, full equality for all citizens is not attainable, and the quest for equality must at some point yield to considerations of practicality. Lines can be and are drawn, and this Court often sustains them. *Douglas v. California,* 372 U.S. 353, 357 (1963). California provides indigents with appointed counsel at trial and on appeal, and on petitions for collateral relief when some showing of possible merit has been made. California has drawn the line at providing indigent felons, at state expense, with lawyers or large libraries in an effort to attack convictions carrying a strong presumption of validity. We submit that this drawing of the line is reasonable under the equal protection clause.

The Court below listed three alternatives for complying with its mandate: installing large law libraries in each correctional institution in California; providing inmates with the assistance of law students; or providing them with lawyers to draft their petitions. None of the alternatives is practicable.

Law libraries are no solution. They are expensive, and could not be provided from the fiscal resources available to appellants. Even more to the point, however, they would be nearly useless. We pointed out at some length in our earlier Brief that inmates are ill-equipped to use lawbooks. These tools of the lawyer's trade are not, in the colorful language of appellees, "amulets," but they are tools the use of which requires intensive training, and which untrained laymen are no more able to use properly than the tools of a surgeon. Neither appellees nor amici have seri-

ously challenged this plain fact. Amici go so far as to rely upon "the general illiteracy, lack of education and intelligence in prisons. . . ." (Brief for Amici Curiae 25.) The court below, which neither heard nor was offered any evidence at all on any subject, made liberal use of "judicial notice," but did not judicially notice that prison inmates have, in any significant numbers, the competence to make effective use of the lawbooks it "suggested" appellants provide. If the matter is a proper subject for judicial notice, this Court should notice that extensive law libraries would not provide sufficient assistance to inmates to outweigh the expense of installing and maintaining them in state correctional institutions.

This leaves law students and lawyers. The benefits of a program whereby law students assist prisoners with the preparation and filing of habeas corpus and other petitions have been judically resognized. *See United States v. Simpson,* 436 F.2d 163 (D.C. Cir. 1970). Under such a program, the law student gains invaluable experience, the inmate receives dedicated, energetic, and reasonably competent assistance, and the courts and attorneys for responding parties receive the benefit of generally well-drafted petitions, all at little or no expense to the state. We fully agree that such programs should be encouraged. Accordingly, as the record shows, it has been the policy of the California Department of Corrections for nearly five years to endeavor to set up such programs in the various correctional institutions (App. 70). We have discussed the matter with law school administra-

tors, attorneys seeking to sponsor such projects, and even individual law students. But our continuing efforts have produced meagre results. Only a few law students have been available, and could assist only a few inmates. Whether our inability, to date, to secure effective implementation of a law-student assistance program is attributable to lack of avaliable student time, lack of student interest, or geography (few of the state's correctional institutions are reasonably accessible to any law school) is not clear. But law students are not subject to conscription for this purpose. Regardless of the disposition of the instant litigation, we will continue to attempt to implement law-student assistance programs, but our lack of success to this point disables us from representing to this Court or the court below that such programs represent a feasible method of providing legal assistance to inmates.

This leaves lawyers. We would be less than candid if we did not admit that lawyers, unlike lawbooks, would be of some assistance to inmates. At the same time, their value could easily be overestimated. The presumption of validity of a conviction which has been affirmed on appeal is extremely strong, and even the best attorney has difficulty in making a silk purse out of a sow's ear. Furthermore, as we pointed out in our earlier Brief, the task of setting forth a simple statement of facts, which is all an inmate need do to get a hearing, with counsel, is one at which the lawyer is not significantly more adept than the inmate, or at least than the "jailhouse lawyer" to which all inmates presumably have access under *Johnson v. Avery*, 393 U.S. 483 (1969). But lawyers do tend to

write with some clarity, and on occasion a lawyer might ferret out a claim which would otherwise go undiscovered.

But providing lawyers to draft petitions for all inmates who want them is the least practicable alternative of all. There are simply not enough lawyers. Mr. Justice Mosk of the California Supreme Court recently discussed the insuperable problems that would be involved in an attempt to provide attorneys for the limited purpose of representing prisoners at parole hearings.

> "Not one prison is located in any of the nine most populous counties in the state, the counties in which the greater number of members of the bar practice. The supply of counsel, limited as it is, does not exist where the demand would be.[5]
>
> ". . . [I]n these past eight years the increased demands upon the legal profession—only a small percentage of which is skilled in the criminal law—have been overwhelming. Public defenders are inundated with cases, and court-appointed counsel are harried. The quality of work has been reflected in the not infrequent dubious quality of service rendered; petitions to reviewing courts on grounds of inadequate representation have multiplied many times. . . ."
>
> ". . . 'The vast expansion of the Sixth Amendment's right to counsel has created an immense burden on the organized bar. Legal Aid and Pub-

[5]There are 2,220 inmates at the California Conservation Center, located at Susanville, 293 miles northeast of the metropolitan Bay Area. In all of Lassen County there are eight members of the State Bar. One of those members is the district attorney.

lic Defender programs, while multiplying with great rapidity, have not been able to scratch the surface of the need for qualified defense lawyers. The last of Gideon's progeny has certainly not yet been seen. . . ." (Read, *Lawyers at Lineups* (1969) 17 U.C.L.A. L.Rev. 339, 377.)

"There are three alternatives to this unfolding dilemma. The first is to increase our supply of lawyers. This is eminently desirable, but obviously any recruitment program by law schools will not be felt for some years. The second is to permit unlicensed practice of the law. To a limited extent this was permitted by the United State Supreme Court in *Johnson v. Avery* (1969) 393 U.S. 483 . . . , but on any expansive scale such practice would clearly be counterproductive. The third alternative, necessary for the present, is to avoid judicially extending the required presence of hired or appointed counsel beyond the areas compelled by the Constitution. At such time as the numerous practical problems appear ripe for solution, primarily the availability of attorneys in sufficient numbers, we can anticipate adoption of appropriate procedures by the Legislature." *In re Tucker,* 5 Cal.3d 171, 183-84, 486 P. 2d 657, 663-64 (1971) (separate opinion).

The sheer impracticability of providing lawyers to draft post-conviction petitions for any inmate wanting them is, if not self-evident, at least made clear by Justice Mosk's exposition.

Amici seem to suggest that the problem could be solved if California adopted some variant of the Uniform Post-Conviction Procedure Act, 9 U.L.A. 541. The Act provides for appointment of counsel *after*

the filing of a petition (in Maine, only after filing of a meritorious petition, Me. Rev. Stat. Ann. tit. 14, §§ 5506, 5507 (1965); *Brine v. State*, 160 Me. 401, 205 A.2d 12 (1964)). The Uniform Act itself does not give appointed counsel authority to amend the petition, but perhaps such authority is implied. At all events, in at least Missouri and Illinois, counsel is required to seek out unalleged grounds for relief and, if appropriate, amend the petition. *See* Brief for Amici Curiae 27 n.22. But for the benefits of appointed counsel, the petitioner under the Act sacrifices the opportunity to present repeated petitions—unless a new ground for relief is alleged which could not have been raised on the first petition, the petitioner gets only "one bite of the apple." See Section 8 of the Uniform Act. Whether the adoption of such a statute would work a net benefit to defendants or the state is certainly a proper legislative question. But there is no warrant for deeming such a statute to be constitutionally required.

And the Act provides for no representation at all in federal proceedings. Whatever merit there might be in enacting a statute appointing counsel on request for the purpose of drafting a federal habeas petition for a state prisoner, the statute would be unworkable if it could be abused by being invoked for an endless succession of petitions. Absent appropriate federal legislation, such abuse would be widespread and would cripple any program for the appointment of counsel.

In sum, to whatever extent legal assistance to prisoners in the drafting of their petitions might be de-

sirable, no feasible method of providing it can be found. The determination of whether a new constitutional right is to be promulgated must necessarily take into consideration the feasibility of vindicating such a right. We submit that the State of California has already done everything practicable to secure legal assistance to its prisoners, and the Constitution requires it to do no more.

II

THE ORDER OF THE DISTRICT COURT IS BARRED BY THE ELEVENTH AMENDMENT

Appellees and amici have raised no serious challenge to our Eleventh Amendment argument. Amici content themselves with citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970); and *Reynolds v. Sims*, 377 U.S. 533 (1964), as examples of cases where this "Court has indirectly required the states to expend public funds in order to bring public programs into compliance with constitutional guarantees." Brief for Amici Curiae 33. None of these cases is apposite. *Swann* and *Turner* were suits against local officers and entities, who are not covered by the Eleventh Amendment. *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 233 (1964). *Reynolds* required legislative reapportionment, which would not necessarily require any expenditure of public funds. *Goldberg* simply enjoined the enforcement of certain regulations, but did not order the adoption of new ones

requiring public expenditures. And in none of these cases was the Eleventh Amendment considered.

Appellees note our argument that *Griffin v. Illinois,* 351 U.S. 12 (1956), and *Douglas v. California,* 372 U.S. 353 (1963), which indirectly required the expenditure of state funds, do not violate the Eleventh Amendment because they were not federal suits, but were decided on direct review of state court judgments. They respond by stating that we advocate basing denial of relief on "a dessicated categorization of forms of action." Brief for the Appellees 30. We find nothing "dessicated" or even particularly perplexing in the distinction between state court actions and federal Civil Rights Act suits. The jurisdiction of the Court below depends solely upon treating this litigation as one arising under the Civil Rights Act. Any attempt at this late date to convert the action into one for habeas corpus relief would throw appellees out of court, since they have failed to exhaust state remedies.

The distinction, for purposes of the Eleventh Amendment, between state and federal actions is vital, and was well stated by this Court in *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459, 470 (1945). The contention of appellees and amici that whatever this Court can do on review of state-court judgments, it can authorize the lower federal courts to do in civil suits against states completely ignores the meaning and purpose of the Amendment—that federal courts have no jurisdiction in suits against states.

We agree with amici and appellees that the Eleventh Amendment does not stand in the way of enforcing the Fourteenth. But it does dictate the appropriate forum, which in this case is plainly not the United State District Court.

CONCLUSION

For the foregoing reasons, as well as for those set forth in the Brief for Appellants, we respectfully submit that the Judgment below should be reversed.

Dated, October 8, 1971.

EVELLE J. YOUNGER,
Attorney General of the State of California,
EDWARD P. O'BRIEN,
Deputy Attorney General,
ROBERT R. GRANUCCI,
Deputy Attorney General,
GEORGE R. NOCK,
Deputy Attorney General,
Attorneys for Appellants.

YOUNGER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. v. GILMORE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 70-9. Argued October 14, 1971—Decided November 8, 1971

319 F. Supp. 105, affirmed.

George R. Nock, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *Evelle J. Younger*, Attorney General, *pro se*, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Robert R. Granucci*, Deputy Attorney General.

John Eshleman Wahl, by appointment of the Court, *post*, p. 814, argued the cause for appellees. With him on the brief was *Marshall W. Krause*.

Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Stanley A. Bass, Anthony G. Amsterdam, William Bennett Turner, and *Alice Daniel* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae* urging affirmance.

PER CURIAM.

On this appeal we postponed the question of jurisdiction pending the hearing of the case on the merits. 401 U. S. 906 (1971).

Having heard the case on its merits, we find that this Court does have jurisdiction (*Alabama Teachers v. Alabama Public School and College Authority*, 393 U. S. 400 (1969)) and affirm the judgment of the District Court for the Northern District of California. *Johnson* v. *Avery*, 393 U. S. 483 (1969).